

Central Law Journal.

ST. LOUIS, MO., JULY 21, 1893.

The death of Mr. Justice Blatchford removes from the bench of the United States Supreme Court one of its ablest members, and one whose place it will be difficult to fill. By experience, natural attainments and training, he was eminently qualified for the position, and he has been universally regarded as a sound lawyer and great jurist. He served for several years, prior to his appointment to the supreme court, as judge of the United States District and Circuit Court of New York, where he made a great reputation, especially in the line of admiralty law. His opinions, while on the supreme bench, have been characterized by exceptional strength and fairness. It is presumed that the vacancy thus created will be filled by the appointment of another New Yorker. The first Chief Justice of the United States was a New Yorker, the Hon. John Jay, who was appointed in 1789, and held the office until he resigned it in 1794 to take the mission of envoy extraordinary to England. In 1800 he was again appointed chief justice, but declined. Brockholst Livingston of New York was appointed associate justice in 1806, and served until his death in 1823. He was succeeded by Smith Thompson of New York, who served from 1823 till he died in 1843. Samuel Nelson of New York was appointed associate justice in 1845, and served until 1872, when he retired with salary continued. His successor was Ward Hunt of New York, who retired in 1882 after ten years' service, and was succeeded by Samuel Blatchford of New York, the excellent judge whom the country is now mourning. Thus six New Yorkers have adorned the supreme bench of the Union, and every one of them has been a lawyer of conspicuous ability and learning, and of high character for integrity and devotion to duty.

If we are to judge by a circular recently issued by an attorney who is practicing in Oklahoma, that territory is making an effort to outbid all its neighbors in the matter of granting easy and quick divorce. The circu-

lar referred to states that the statutes of Oklahoma specify no fewer than "ten separate and distinct causes, for any one or more of which a divorce may be obtained," including that comprehensive term "gross neglect of duty;" that the probate court of each county, "which is always in session," has jurisdiction in actions for divorce "which affords litigants an opportunity to obtain relief very speedily and without having to await the slow process of the district court;" that the statute requires only three months' residence in the Territory; and finally, that "persons coming to Oklahoma will find the city of Kingfisher with its 4,000 inhabitants and all modern improvements, a very pleasant place to live in." South Dakota should look to her laurels, or she will be eclipsed in the divorce line by Oklahoma.

The *London Law Journal* expresses its gratification, that by the judgment of the Supreme Court of Alabama, in the case of *Arp v. The State*, of which we published a synopsis in a recent issue—36 Cent. L. J. 331—the curious defense of "homicide by necessity," already banished from England by the decision of the Court of Queen's Bench, in the memorable prosecution of Dudley and Stephens for the murder of the boy Parker on the high seas under pressure of starvation, is now outlawed also in one of the leading American States. We join in the hope expressed by that Journal, that the decision will be followed in other States, where, as in Ohio, "some uncertainty on the point seems to linger." There is, of course, a form of homicide by necessity which every civilized system of jurisprudence ought to recognize—the right of every man to repel by violence, carried, if need be, up to the point of killing, any illegal violence practiced upon himself. But neither in the common law nor in the principles on which the common law is founded will any sanction be discovered for the doctrine that any man may excuse himself under the plea of necessity or compulsion for taking an innocent life. The *London Law Journal* says that it speaks the more strongly on this subject, because "it is unfortunately at the door of England and of one of England's greatest lawyers that the responsibility for the theory which the Supreme Court of Alabama has just brushed

aside must lie. 'If divers,' wrote Lord Bacon in his commentary on the maxim, *Necessitas inducit privilegium quoad jura privata*, 'be in danger of drowning by the casting away of some boat or barge and one of them get to some plank or on the boat's side to keep himself above water, and another, to save his own life, thrust him from it, whereby he is drowned, this is neither self-defense nor misadventure, but justifiable.' Doubtless the same thought may be, and, indeed, is found in other writers. But it is impossible to study the literature of 'homicide by necessity' without seeing that Lord Bacon's *dictum* has been its chief inspiration. We rejoice that American lawyers, following the example of their English brethren, are now repudiating its authority. It is supported by no decisions; it is expressly contradicted by Sir Matthew Hale; it is discredited by the testimony of a cloud of witnesses, who, for the sake of others, have courted death with greater eagerness than ever Epicurean courted pleasure; and its recognition would lead to an absolute divorce of morality from law. In the eloquent language of Lord Coleridge, in the case of Dudley and Stephens: 'Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle contended for leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own.' The only necessity which a brave man would recognize, or whose existence the law should for a moment admit, in such circumstances as Arp alleged to have beset him, is that immortalized by the noble Roman, to whom Lord Bacon himself referred: '*Necesse est ut eam, non ut vivam.*'"

NOTES OF RECENT DECISIONS.

CRIMINAL LAW—ACCUSED AS A WITNESS—COMMENTS OF COUNSEL.—In *Wilson v. United States*, before the Supreme Court of the United States, the district attorney in summing up the case to the jury, said: "If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the

stand, and hold up my hand before high heaven, and testify to my innocence of the crime." The court, its attention being called to this language by the defendant's counsel, said: "I suppose the counsel should not comment upon the defendant not taking the stand." The district attorney replied: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf." Counsel for defendant thereupon excepted. A verdict of guilty was rendered. It was held in an opinion by Mr. Justice Field, that the refusal or neglect of the court to prohibit any reference to the accused's failure to take the stand and to emphatically instruct the jury not to attach any importance to such failure, was error, tending to prejudice defendant, and was sufficient ground for awarding a new trial, and that any reference by counsel for prosecution to the accused's failure to take the stand is improper, under the act of March 15, 1878, which provides that such failure "shall raise no presumption against the defendant."

WATER COMPANIES—PRIVITY OF CONTRACT—RIGHTS OF THIRD PARTIES.—In *House v. Houston Waterwork Co.*, the Court of Civil Appeals of Texas hold that a contract between a city and a water company, whereby the latter agrees to furnish water for the extinguishment of fires, does not give a private person, whose property is burned up through failure to furnish water, any right of action therefor against the company, since he is no party to the contract. Williams, J., says:

The contract set up in the petition does not differ materially from those, the effect of which has been passed upon and adjudged in many reported cases. It was with the city of Houston, and bound the appellant to furnish water to the fire department for the extinguishment of conflagrations, so far as the means and instrumentalities specified in the contract were capable of producing it. Appellant was no party to the agreement, and cannot base an action upon its breach unless he is to be treated as a person for whose benefit it was made, in such sense as to entitle him to sue upon it. In some sense, all contracts entered into by a municipal corporation may be considered as made for the benefit of its constituents. But this does not enable every individual who fails to reap the advantage intended to be secured to him and the other citizens of the municipality to sue the contractor for his failure to observe his contract. As was said by the Supreme Court of Iowa in a case like this: "One whom the law regards as a stranger to the contract cannot maintain an action thereon. The rule is founded in the plainest reason. The contracting parties control all interests, and are entitled to all

rights, secured by the contract. If mere strangers may enforce the contract by actions on the ground of benefits flowing therefrom to them, there would be no certain limit to the number and character of actions which would be brought thereon. The case before us is not an exception to the rule we have stated. The city, in the exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires, and for other objects demanded by the wants of the people. In the exercise of the authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied, in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulations, and the like." *Davis v. Waterworks Co.*, 54 Iowa, 59, 6 N. W. Rep. 126. See, also, *Becker v. Waterworks*, 79 Iowa, 419, 44 N. W. Rep. 694; *Fowler v. Waterworks Co.*, 83 Ga. 219, 9 S. E. Rep. 673; *Foster v. Water Co.*, 3 Lea, 42; *Ferris v. Water Co.*, 16 Nev. 44; *Nickerson v. Hydraulic Co.*, 46 Conn. 24. In all of these cases the questions involved in this appeal were considered, and decided adversely to appellant. In *Fowler v. Waterworks Co.*, *supra*, the English cases, and some other authorities relied on by appellant's counsel, were reviewed, and held not to apply to the questions involved in this class of cases. Of the authorities cited in appellant's brief, the only ones which conflict with those above cited are two decisions of the Supreme Court of Kentucky, in which the questions involved in this case are directly decided in favor of appellant's position. Those opinions are somewhat elaborate, but contain no discussion of, or reference to, the other decisions announcing contrary views, and fail to convince us of the incorrectness of the general current of authority. *Paducah Lumber Co. v. Paducah Water Supply Co.* (Ky.), 12 S. W. Rep. 554; *Duncan v. Water Co.* (Ky.), 12 S. W. Rep. 557. The subject has been so thoroughly considered in the decisions referred to that it would be a useless consumption of time to elaborate. We must therefore hold that, by its contract with the city appellee did not become liable to suit upon such contract by appellant.

EQUALIZATION OF STOCKHOLDERS OF INSOLVENT BUILDING, LOAN AND SAVINGS ASSOCIATIONS.

It occasionally happens that, on the winding-up of a building or loan association, it is found that some of the stockholders have been unduly advanced, or some of them have been paid in full while others have not. This has occurred as between borrowing and non-borrowing stockholders, where the former have received the full amount due them while the latter have not. In such an instance those not fully satisfied are entitled to satisfaction; but suppose the association has not sufficient funds to satisfy them? Then the question arises, "Can the association assess the satisfied shares of stock to an amount sufficient to

pay off the unsatisfied shares?" In such an instance it may be said that the association is insolvent, and in a case of this kind it was observed in a Pennsylvania case: "The insolvency of the company, as before observed, puts an end to its operations as a building association; to a certain extent it also ends the contract between it and its members respectively, and nothing remains but to wind it up in such a manner as to do equity to creditors, and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not to throw upon either borrowers or non-borrowers more than their respective share. The result may be reached by requiring the borrower to repay what he actually received with interest. He would then be entitled, after the debts of the corporation are paid, to a *pro rata* dividend with the non-borrowers for what he has paid upon his stock. He will thus be obliged to bear his proper share of the losses. To allow him to credit upon his mortgage his payments on his stock would enable him to escape responsibility for his share of the losses, and throw them wholly upon the non-borrowers. In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent corporation in this manner."¹ In another case it was said: "It would be further liable for all proper arrearages and charges, and for his proportion of the losses which may have occurred prior to his notice of withdrawal, conceding such withdrawal to be valid. For it is idle to say that when stock of a particular series of stock matures a holder is entitled absolutely to its par value. From such value must necessarily be deducted any expenses or losses incurred in winding up the association of the particular series. Such losses may be trifling or they may be serious. What the stockholders are entitled to under such circumstances is an equal division of the assets, less expenses and losses. Aside from this, assuming that the resolution of February 6, 1877, matured the stock of the first series, I am unable to see how a stockholder of that series can withdraw after such maturity. The plain object of the act of 1859 was to permit a stockholder to withdraw during the active life of the association of the series. It

¹ *Strahan v. Franklin, etc. Association*, 115 Pa. St. 273, 8 Atl. Rep. 843; approved in *Callahan's Appeal* 124 Pa. St. 138, 16 Atl. Rep. 638.

makes no provision for a withdrawal after the stock has reached par, and the association exists only for the purpose of liquidation. Nor can any object be perceived for such withdrawal except to gain the right to sue immediately for the value of the stock. This would be giving an unfair advantage which the law does not favor."² "A large number of borrowers, and a few non-borrowers, were left. Its remaining assets were affected by the shrinkage and losses incident to all property at that time. All of this loss fell upon those who remained in. The association could not wind up at the 102d meeting, as was at one time contemplated. The borrowing members now want their loans cancelled and their liens satisfied, although their stock has not matured. This would let them out without having paid up in full, and throws the whole loss on the non-borrowers. It needs no argument to show that this cannot be done. The appellants have no equity to make such a demand, nor have any power to grant it. The owner of the free shares propose to pay up until the stock matures, and ask that the appellants do likewise. There is perfect justice in this."³ In this same State it is held that upon the insolvency of a building association and an assignment for the benefit of creditors, the holders of matured stock are not creditors and can only share *pro rata* with the holders of immatured stock, after the payment of the creditors of the corporation.⁴ The same idea of equality is carried out in New York, where it was held that each member for each share held by him was entitled to the same amount, *i. e.*, a proportionate share of the assets; if a debtor, and if he owed more than his distributive share, he was bound to pay the balance, and upon such payment was entitled to a discharge of his mortgage.⁵ In Ohio a building association advanced a shareholder \$3,000, being the estimated value of twelve shares held by him. At the same time he executed to the association a mortgage on his real property to secure the prompt payment of his weekly dues, interests, premiums and assessments, "until such time as the

weekly dues paid and dividends declared and unpaid shall amount to said sum of \$3,000." This was in accordance with the constitution of the association. He fulfilled the conditions of the mortgage until Nov. 27, 1889. On that day, at a regular meeting, in good faith he made the regular weekly payment of the dues, and so forth, owing to the association. With this payment the aggregate of the weekly dues paid by him and dividends declared and unpaid, amounted to \$3,000. Before the next meeting day the corporation, having been found insolvent, was placed in charge of a receiver. It was ascertained by calculation that the association's losses were such as to require an assessment upon all the members of over 31 per cent. to make an equitable adjustment and distribution of assets among all members, borrowers and non-borrowers. The receiver brought suit against the borrowing stockholder for 31 per cent. of \$3,000 and a recovery was allowed. A statute of that State provided as follows: "So much of the earnings as may be necessary shall be set apart to defray the current expenses of the association, and a portion of the earnings, to be determined by the board of directors, shall be reserved, annually or semi-annually, for the payment of contingent losses, and the residue of such earnings shall be transferred as a dividend, annually or semi-annually in such proportions to the credit of all members as the association, by its constitution and by-laws, may provide; also in case of a loss, all losses shall be assessed in the same proportion and manner on all members after the amount in the reserve fund has been applied to the payment of such loss, and upon the cancellation of any share or shares that have been fully paid, the corporation shall pay to such member or members their *pro rata* share of so much of the reserve fund as has been accumulated during the membership and remains therein at the time of the termination of the membership of such members or members." Another section provided: "All adjustments of losses between such corporations and its borrowing members shall be upon the following terms, to-wit: After the premiums for one year has been paid, and also the interest and premiums on such loans up to the day of settlement, the borrowing member shall pay to the corporation an amount, which, added to

² Laurel Run, etc. Association v. Sperring, 106 Pa. St. 334.

³ Booz's Appeal, 16 W. N. Cas. (Pa.) 365.

⁴ Criswell's Appeal, 100 Pa. St. 488.

⁵ People v. Lowe, 117 N. Y. 175, 22 N. E. Rep. 1016, reversing 47 Hun, 577.

the dues and dividends credited, will equal the sum actually borrowed; and also such fines and other assessments as provided by the constitution and by-laws of such corporation." Under these provisions the court held that a borrowing shareholder was under personal obligation to share in losses; and that this liability was not affected by the circumstances that his dues paid and dividends credited amounted in the aggregate to the sum loaned or advanced to him on his shares, if there had been no actual adjustment as provided for in the above quoted sections. "In the absence of any actual adjustment or compromise with the corporation, the borrower, as a stockholder, however, retains his right to participate in the earnings, in accordance with the Revised Statute [quoted above], and continues under the obligation to pay his stock in full and his proportion of the losses. The contention of the defendant that his membership has ceased, and that he is not to bear his proportion of the losses, cannot, therefore, be sustained." But the court held that the obligations to pay these losses was personal and could not be enforced as a part of the obligation of the mortgage.⁶ A clause in the by-laws of an association provided that "the note given by the borrower and the stock upon which the loan was made shall be set off against each other," is not self-executing. It requires some action upon the part of the building association. Nor does the fact that they are set-off against each other conceal the holder's membership in the association. He still remains a member. The fact that he might have withdrawn upon serving notice of his intention so to do, if this is true, does not annul his membership unless he actually withdrew.

"While the plaintiff in error," said Justice Strong, "remained a member of the association, he was under obligation to contribute his share of the expenses. What he had invested in its funds was chargeable with its proportion of the necessary expenditure. In a limited sense, he was a partner with the other stockholders. Though, as a mortgagor, he could not be compelled to pay more than the sum actually borrowed by him, with legal interest thereon; it was only as a member that he could claim a share of the profits of the company, or any benefits from payments

⁶ *Evermann v. Schmitt*, 24 W. L. B. 56. See *Hineman v. Ryan*, 3 Ohio C. C. 529.

made by others. If he may now set-off against his mortgage a share of the profits made equal to the liability which he has incurred for expenses, he will, in effect, recover more than he has paid in, and will throw upon his associates the whole of a burden, which in truth is his as much as theirs. This cannot be. The association has a right to treat his payments while his membership continued, as his contribution, so far as they are needed, to the discharge of the expenses incurred in the management of the enterprise, in which he had a joint interest with others. Nor has he now any title to the premiums and fines paid by other borrowers."⁷ In another Pennsylvania case it was said: "Has a building and loan association the right to retain or hold back from a retiring member a reasonable amount to meet his share of the probable losses that may arise from loans made while he was a member? This is the question presented by the special verdict of the jury. Under the act of the assembly and the by-laws of this association, a member has the right to withdraw, after giving thirty days' notice to that effect, and is entitled to receive back the money he paid in, with a share of the profits during the time he was a member. But suppose the association made no profits and met with severe losses? Shall the withdrawing members get back all they paid and cast the whole burden of losses upon those who remain, or who may not know of the losses, and not be so quick in giving notice of withdrawal? Certainly not. That would be unjust and inequitable. * * * To allow a member, under such circumstances, to retire and demand all he paid in, without contributing anything to losses which are manifest and impending, would be unjust toward his fellow-members. And it would be bad faith in him. He has a right to share the profits while a member, and he must also bear his proportion of the losses."⁸ In another Pennsylvania case it was held that a stockholder withdrawing from a building association must bear his proportion of losses sustained prior to notice of withdrawal.⁹

In Virginia it is held that a court of equity,

⁷ *McGrath v. Hamilton, etc. Co.*, 44 Pa. St. 383.

⁸ *Knoblauch v. Robert Blum, etc. Association*, 25 Pitts. Leg. J. 39. See also, *Paffert v. Robert Blum, etc. Co.*, 25 Pitts. Leg. J. 40.

⁹ *Wittman v. Concordia, etc. Association*, 73 Pa. 95, 36 Leg. Int. 72.

at the suit of the shareholders of unredeemed shares in a building fund association may call the redeemed shares to account, enforce payment of what they respectively owe, distribute the fund among the unredeemed shareholders, and wind up the institution.¹⁰ A shareholder is not liable for losses occurring after his retirement,¹¹ unless the withdrawal was illegal.¹² There are several English cases upon the point under discussion. There the rules of an English building association provided that any shareholder might withdraw on a month's notice in writing, and he should receive back the subscriptions then paid, with interest; and if more than one shareholder gave notice to withdraw at one time, they should be paid according to priority of notice. The rule also provided that the funds of the society should belong to the members in proportion to the time they had been subscribers, and that no dissolution should be completed until the close and maturity of all shares then in existence. Losses occurred through frauds of the secretary, and the company was wound up. After the payment of all debts, there remained a surplus sufficient to pay each shareholder about ten shillings in the pound on the value of his shares, according to the period of his subscription at the date of the winding-up order. A call having been made to adjust the right of the contributories *inter se*, it was held that the assets of the company belonged to the members, *pro rata*, according to their respective periods of subscription, and that a call, in order to equalize the value of all the shares was not necessary nor proper.¹³

In another instance the rules of a society provided that the shares were to be limited to 25*l*; that a shareholder who had not received on advance was to pay up his shares by monthly installments and when such installments, with profits, amounted to 25*l* per share he was to be paid out. If a member received an advance, it was provided that he should pay up his advance by monthly installments on his shares, with interest at the rate of 5 per cent. on the loan. It was also provided that by giving one

month's notice a member could withdraw. If an unadvanced member withdrew, he was to receive the whole installments paid on his shares, with interest. If a borrowing member withdrew, he was to pay up the whole of his debt, interest and penalties, after deducting the amount of the monthly installments paid upon his shares with interest calculated thereon. A took shares for the sole purpose of obtaining an advance, and executed the usual bond of security; and the society granted him a backletter to the effect that they agreed not to enforce the bond so long as the regular payments of the installments, interest and other sums due upon his shares were paid. He regularly paid his installments with interest charged on the whole sum lent. The society incurred losses, and was ordered to be wound up, having no outside creditors. Four months after the issue of the order A gave notice, under the rules, of a withdrawal, to the liquidators, and claimed a discharge of his bond on paying to them the difference between his loan and the amount *in cumulo* of the installments paid by him, with interest added. The liquidator denied his right to withdraw after liquidation, unless he paid up his entire loan and left the installments to be refunded according to the result of the liquidation; but the court decided that the advance, had *pro tanto*, been extinguished by the total amount of the installments paid by A; that from and after the date of the winding-up order A had a right to redeem his security by paying to the liquidators the difference between his advance and his installments, with interest added thereon, as against excess of interest which he had been charged; and on payment of such difference, with interest thereon, he was entitled to be relieved of all further liability as a contributor or otherwise.¹⁴ Under like rule it was decided that the withdrawing members were not bound to remain members and bear a share of the losses incurred by the society.¹⁵

In another instance one of the rules of a society gave power to investing members to withdraw their money, if the funds permitted, on giving notice according to a prescribed form printed in the sched-

¹⁰ *Edelin v. Pascoe*, 22 Gratt. 826; *Wittman v. Building Association*, 7 W. N. Cas. 80.

¹¹ *Christian's Appeal*, 102 Pa. St. 184.

¹² *Carson v. Seldner*, 77 Va. 293.

¹³ *In re Doncaste's Permanent Building Society, L. R. 4 Eq. Cas. 579*; 36 L. J. Ch. 871, affirming L. R. 3 Eq. Cas. 158; 15 W. R. 102; 15 L. J. N. S. 150.

¹⁴ *Brownlie v. Russell*, L. R. 8 App. Cas. (Sc.) 235, 48 L. J. 881.

¹⁵ *Tosh v. North British, etc. Society*, 11 App. Cas. 489, 35 W. Rep. 413; 14 C. of S. Cas. (H. L.) 6.

ule. The society was ordered to be wound up, and the assets were insufficient to pay the investing members in full. Several of the investing members had given notice to withdraw all their money, and their notices had expired before the commencement of the winding-up, but they had not been paid. Some of them had not used the printed form of notice prescribed by the rules, but their notice had been accepted by the directors. The court decided that the rule as to the withdrawal of members must not be confined to the society as a going concern, but was applicable to adjust the rights of the withdrawing and continuing members *inter se* in the winding up; that the members who had given notice to withdraw, either in the prescribed form or otherwise, and whose notices had expired before the commencement of the winding up, were entitled to be paid out of the assets next to the outside creditors, and in priority to the other investing members who had not given notice of withdrawal, notwithstanding that at the date of the winding up there was no funds in hand for their payment.¹⁶ The rules of a society allowed any investing member to withdraw, "provided the funds permit," upon giving notice; and declared that "no further liabilities shall be incurred by the society till such member has been repaid." On an order to wind up a society, it was found that the assets were insufficient to pay everybody, and it was decided that the investing members, who had given notice of withdrawal, and whose notices expired before the winding-up had begun, were entitled, after the outside creditors, to be paid out of the assets before the members who had not given notice of withdrawal, notwithstanding the fact that between the giving of the notices and the winding up there never were any funds for payment.¹⁷ The rules of a society provided (1) that advanced members could redeem their securities on payment of the amount fixed by the tables of the society, together with the full amount which

should then be due "for subscriptions, fines, and other payments;" (2) that surplus profits "after providing for all liabilities," should be appropriated equitably and equally between the investing and borrowing members; and (3) that "in the event of the directors determining," at a special meeting to be held every three years, that there was "a deficiency of income by which the society might be prevented from meeting its anticipated expenditure and liabilities," the amount of such deficiency should be "apportioned by the directors between the investing and borrowing members." The assets being insufficient to pay investing members the full value of their shares (although there were no outside creditors), the liquidator applied to place advanced members on the list of contributories, no apportionment of losses, however, having been made by the directors. The court decided that the "liabilities" to be provided for under rule 2, included sums payable to investing members; that "income" in rule 3 was not used in contradistinction to capital, but meant what was coming in from all sources, and that "liabilities" in the same rule also included sums payable to investing members; that under these rules advanced members were liable to contribute to any losses together with the investing members, and that any member seeking to redeem could only do so upon paying what might be due from him in respect of liability. The fact that the directors had not "determined" and "apportioned" the loss, made no difference now that the society was being wound up by the court. The court also decided that rules similar to rule 3 constitute a special contract between the members, under which advanced members are liable to contribute ratably with investing members, both towards paying outside creditors and also in bearing the other losses incurred by the society, which but for such contract would fall on investing members alone.¹⁸ Without such a rule as rule 3, the members having withdrawn would not be liable.¹⁹ After a society is known to be insolvent, an advanced shareholder cannot

¹⁶ *In re Blackburn, etc. Society*, 24 L. R. Ch. Div. 421, 52 L. J. Ch. 894; 32 W. Rep. 159; S. P. *In re Mutual Society*, 24 L. R. Ch. Div. 425, note.

¹⁷ *Walton v. Edger*, 10 App. Cas. 33, 54 L. J. Ch. 362; 52 L. T. 666; 33 W. Rep. 417; 49 J. P. 468. S. P. *Murray v. Scott*, 9 App. Cas. 519; 53 L. J. Ch. 745; 51 L. T. 462; 33 W. Rep. 173, and *Middlesborough Building Society*, 53 L. T. 203. *In re Sheffield, etc. Society*, 22 Q. B. Div. 470, 58 L. J. Q. B. 265; 60 L. T. 186; 53 J. P. 375; 5 L. T. Rep. 192.

¹⁸ *In re West Riding, etc. Society*, 43 Ch. Div. 407, 59 L. J. Ch. 197; 62 L. T. 486; 38 W. Rep. 376; 6 T. L. Rep. 160.

¹⁹ *Tosh v. British, etc. Society*, 11 App. Cas. 489, 35 W. Rep. 413, 14 C. of S. Cas. (H. L.) 6; *In re West Riding, etc. Society*, 45 Ch. Div. 463, 59 L. J. Ch. 823; 63 L. J. 483; *In re Britannia, etc. Society*, 65 L. T. 196, 39 W. Rep. 74.

withdraw, and escape liability.²⁰ An advanced member may be debarred from participation in distribution of the surplus assets of the society when it is wound up; and the test is whether he would be liable to assessments if the unadvanced shareholders are not paid in full. This was decided in an English case, where all the debts had been paid, and there was a sum of surplus assets for division among the members. The rules provided that when it should be deemed advisable to bring the operations of the society to a termination, a general meeting should be held, which should have power to dissolve the society; and when all payments due the society by members or any other person had been satisfied, and the debts of the society paid, the stock of the society should be divided among the members according to the respective number of unadvanced shares which each member might have standing at his credit in the books, and allowing the fair and proportionate rate of profit upon each such share according to the duration of their payments to the society. The court held that as the rules did not expressly provide for the case of a compulsory winding up, the assets must be divided, as near as might be, according to the interests existing at the commencement of the compulsory winding up; that the unadvanced members were free from all liability beyond what they were bound to contribute up to that date, but that they could not participate in the distribution of the surplus assets before paying or bringing into account all that was due from then down to the date of the winding-up; and that the advanced members were not liable to be put upon the list of contributors, but were entitled to redeem upon the terms expressed in the rules, as if no winding-up order had been made.²¹

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²⁰ *Sunderland, etc. Society v. Rawlings, etc. Society*, 24 Q. B. 394; 59 L. J. Q. B. 217; 62 L. T. 293; 38 W. Rep. 509; 54 J. P. 613; 6 T. L. Rep. 199.

²¹ *In re Middlesborough, etc. Society*, 58 L. J. Ch. 771, 5 T. L. Rep. 518.

PERSONAL INJURY—LICENSEE.

FARIS V. HOBERG.

Supreme Court of Indiana, April 20, 1893.

1. Where the evidence without dispute is insufficient to prove a necessary fact in the plaintiff's case, the court may direct the verdict.

2. The occupant of premises is under no legal duty to keep them safe from the danger of obstructions for persons who go there for their own pleasure or convenience, and not at his invitation, express or implied.

HACKNEY J.: The appellant prosecuted this action in the court below for the recovery of damages in the sum of \$20,000, alleged to have been sustained in falling into an open elevator shaft upon the premises of the appellees. The issue was joined by a general denial, and in the submission of the cause the court instructed the jury to return a verdict in favor of the appellees. This action of the court is here submitted for review.

The appellees were retail merchants in the city of Terre Haute, their storehouse fronting on Wabash avenue, and extending north 141 feet and 10 inches, with an alley on the west 16 feet in width. In the northwest corner of the building on the first floor, was a freight room extending north and south 18 feet and 11 inches, and being 7 feet and 11 inches in width. To this room double doors opened from said alley, and immediately south of this room was the shaft of the freight elevator (where the injury was sustained), occupying the full width of said freight room. Immediately south of the elevator is a vestibule entrance to the storeroom. To the elevator shaft was an entrance on the south of 4 feet in width by 7 feet in height, and a like entrance from the freight room 4 feet and 9 inches wide, and directly opposite the entrance from the salesroom. The vestibule entrance to the salesroom opened immediately south of the west side of the salesroom entrance to the freight elevator, and from this entrance one could pass behind a dry goods counter on the right into the elevator shaft at the left, or around a large table laden with goods, and through a narrow opening between said table and said counter, to that part of the salesroom devoted to the walks for customers between the counters. On the alley, and next to the storehouse, is a walk of stone flagging 30 inches wide, 68 feet and 10 inches long, and extending north from Wabash avenue. From the north end of this walk to the vestibule entrance it was 40 feet and two inches, without paving. On the occasion of appellant's visit to appellees' storeroom he was seeking a drayman to haul some of his goods, not connected with appellees' business, and learning that John Burns, the owner of a transfer wagon, was in the rear of appellees' store, went to the alley, and saw the wagon at the entrance to the freight room. Going up the alley he could not see Burns, and presuming that he was in the building, he stepped in at the vestibule entrance. He immediately turned, facing the two openings to the elevator shaft, and, seeing some person in the freight room, asked for the drayman, and received an answer from the freight room that he was in there. At once appellant started into the freight room through said openings, and fell through the shaft, neither of the openings to which was guarded or protected by barriers. All of the foregoing facts are undisputed. There are some controverted facts as to the character of

lights near the shaft, and as to the extent of the darkness within the shaft; facts, from the appellant's theory of the case, essential to the charge of negligence against the appellees. There were also controverted facts as to appellant's vision having been so obscured by the sudden change from the bright sunlight without, and the softer lights and shadows within, the building, and probably as to other matters, but all having reference to the question of contributory negligence on the part of the appellant.

Numerous authorities are cited by the appellant to the proposition that, in a case involving questions of negligence, the court is not at liberty to take such questions from the jury, but must leave them to the jury for decision. Of the cases so cited was *Car Co. v. Parker*, 100 Ind. 181; *Koerner v. State*, 98 Ind. 7; *Weis v. City of Madison*, 75 Ind. 241; *Crookshank v. Kellogg*, 8 Blackf. 256; and *Elliott, Works of Advocate*, 686. These cases all belong to that class where a question of fact is controverted, and that question is one necessary to plaintiff's recovery, or essential to the defendants' proper defense. None of them hold that the jury is the exclusive judge of the existence or non-existence of negligence as an ultimate fact. A moment's reflection will show the error of a rule which would deprive the court of the right to determine whether a given state of facts, uncontroverted, does or does not constitute actionable negligence. When the facts are submitted to the court upon demurrer to a complaint, the court exercises the power of determining whether such facts, if proven, will constitute actionable negligence. When, under the practice prevailing the jury does not return a general verdict, but returns findings of fact by special verdict, the court must determine whether the facts so found are sufficient to warrant the conclusion of the existence of negligence. When, during the trial, the court is called upon to instruct the jury, there is, that we now recall, but one limitation upon the duty to charge that a given state of facts, if found by the jury to exist, does or does not authorize the finding of negligence, and that exception is where the facts clearly established are such that one man, impartial and of good judgment, would infer that negligence existed, while another man, equally sensible and impartial, would infer that proper care had been used. Upon such facts it is the province of the jury to adjudge the existence or non-existence of negligence. *Railway Co. v. Col-larn*, 73 Ind. 261. The case in hand is not of that class. If it were otherwise, the purpose of the charge to the jury would be thwarted, and that which is designed for the instruction of the jury upon matters of law, where it is supposed its members have not the special knowledge possessed by the judge, would be but a useless ceremony, and the jury would be given the arbitrary and uncontrolled power to determine what facts, however important or however trivial, should constitute actionable negligence. In the progress of the trial the court determines the admissibility

of evidence as having, or as not having a tendency to prove negligence, and it may not be said that in doing so the functions of the jury are usurped by the court. Some of the authorities cited expressly recognize the existence of cases where the court may take the questions from the jury. In *Weis v. City of Madison*, *supra*, p. 254, it is said: "There are cases where the court may rightfully direct a verdict. A judge is not bound to submit a question to a jury where their verdict, if contrary to his views of the testimony and its legal effect, would be certainly set aside as clearly against the law and the evidence. *Dryden v. Brit-ton*, 19 Wis. 31; *Godin v. Bank*, 6 Duer, 76; *Lone v. Railroad Co.*, 14 Gray, 143; *Improvement Co. v. Munson*, 14 Wall. 442; *Jewell v. Parr*, 13 C. B. 909; *Parks v. Ross*, 11 How. 362; *Pleasants v. Fant*, 22 Wall. 116; *Dodge v. Gaylord*, 53 Ind. 365-377." In *Car Co. v. Parker*, *supra*, it is said: "There are, no doubt, cases where the court will determine the question of contributory negligence, but this is not one of them." The opinion then proceeds by setting forth the facts in dispute, which facts were there held to be essential to a conclusion of negligence. The case of *Koerner v. State*, *supra*, holds that the court has not the right, in charging the jury, to assume the existence of some essential fact; but it is said: "Where the existence of a fact is established without any conflict, contradiction, or dispute," it is not error to assume the existence of such fact. In *Works of Advocate*, *supra*, Judge Elliott says: "Where the plaintiff wholly fails to make out a case, the defendant is entitled to an instruction directing the jury to return a verdict in his favor. If the evidence of the defense entirely answers and overthrows that of the plaintiff, not leaving him a *prima facie* case, the former is entitled to an instruction requiring the jury to give him the verdict. On the other hand, if the defendant's evidence wholly fails to meet that of the plaintiff, or to establish any affirmative defense, it is the plaintiff's right to have the jury so instructed. Neither party is, however, entitled to such an instruction where there is a conflict of evidence upon a material point."

Is this a case, where, under the rules quoted from the authorities cited by the appellees, the court had the right to direct a verdict for the defendant? In every case involving actionable negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform that duty; and (3) an injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad, or the evidence insufficient. As a question of evidence, the facts are given to the jury, and, if there is no evidence whatever as to one of the three elements, then, as a question of

law, the plaintiff has failed, and the court may direct a verdict for the defendant; or if there has been evidence as to one of the three elements, and that evidence is not conflicting, but is free from dispute, the jury has no office to perform in reconciling conflict; and if left to return a verdict, and it should be for the plaintiff, the court would, if the unconflicting evidence of that one element was not sufficient to establish the element, set aside the verdict as not supported by the evidence. If, before the retirement of the jury, the court shall see that the evidence so without dispute is insufficient to prove the one element to which it is addressed, the court may direct the verdict, because a finding for the plaintiff would not be supported by the evidence. If this case is with the appellees, it must be because the appellant failed to establish one of the elements essential to the conclusion of actionable negligence by evidence, free from such conflict as required the jury to weigh it and adjust the differences between witnesses, or because, giving the whole evidence the most favorable construction, and the most favorable, yet reasonable, inference in his behalf, it fails to establish the element in question. *Mann v. Stock Yard Co.*, 128 Ind. 138, 26 N. E. Rep. 819; *Railroad Co. v. Schmidt* (Ind. Sup.), 33 N. E. Rep. 774 (decided at this term), and cases therein cited.

Taking the undisputed facts as we have stated them, and according to them all reasonable inferences in appellant's favor, the first inquiry naturally suggesting itself is, did the appellees owe to the appellant a duty to protect him from the dangers of the open elevator shaft? In *Railroad Co. v. Griffin*, 100 Ind. 221, it was held that "the owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission. In such case the licensee goes there at his own risk, and, as has often before been said, enjoys the license with its concomitant perils." Again, in *Thiele v. McManus*, 3 Ind. App. 132, 28 N. E. Rep. 327, it is said: "A complaint for personal injury through negligence must show a legal duty or obligation toward the person injured, existing at the time and place of the injury, which the defendant failed to perform or fulfill, and that the injury was occasioned by such failure. *Sweeny v. Railroad Co.*, 10 Allen. 368; *Railroad Co. v. Griffin*, 100 Ind. 221; *City of Indianapolis v. Emmelman*, 108 Ind. 530, 9 N. E. Rep. 155. Such a duty arises out of some relation existing at the time between the person injured and the defendant, which the complaint, by the averment of fact, should show. The owner or occupant of premises is not under any legal duty to keep them free or safe from the danger of obstructions, pitfalls, excavations, trap-doors or openings in floors, for persons who go upon, into, or through the premises, not by his invitation, express or implied, but for their own pleasure or convenience,

though by his own acquiescence or permission, and who therefore are mere licensees. Such a visitor enjoys the license subject to the attendant risks. *Railroad Co. v. Griffin*, *supra*; *City of Indianapolis v. Emmelman*, *supra*; *Sisk v. Crump*, 112 Ind. 504, 14 N. E. Rep. 381; *Penso v. McCormick*, 125 Ind. 116, 25 N. E. Rep. 156; *Schmidt v. Bauer* (Cal.), 22 Pac. Rep. 256; *Holmes v. Railroad Co.*, L. R. 4 Exch. 255; *Matthews v. Benschel*, 51 N. J. Law, 30, 16 Atl. Rep. 195." The case before the appellate court was a stronger case for the injured plaintiff than in the case now before this court. It was shown that the plaintiff fell through a hatchway located in that part of the storeroom used as a walkway, and where the customers of the defendant would and did naturally go in trading and inspecting their goods. It is not shown that the plaintiff was one of the class of persons invited to visit the premises, though it is alleged in the complaint that she was "properly and necessarily in said building without fault on her part." Of this the court said: "If this be considered sufficient to show that the appellee was not a trespasser, it cannot be regarded as showing that she was in the place of danger by the invitation of the appellants, or as showing more than that she was a mere licensee." We regard the case just quoted as stronger than the case before us, for the reason that the hatchway through which the injury was sustained was located in the walkways provided for customers, and not, as in this case, behind a counter, and as a connection between the room to which customers were invited and a freight room, to which there is no evidence, and no reasonable inference, that the appellant was invited. It is not a natural inference that an invitation, express or implied, to visit the store as a customer, carried with it the privilege of entering the store from an alley, and of going into a freight room, separated by walls and cut off from the sales room by the freight elevator. There is no claim that there was an express invitation to appellant to visit the store, to enter through the alley, or go into the freight room. There is no reason to infer, from any evidence in the cause, or from any claim of counsel for appellant, that he could any more presume upon the right of a customer in going into the freight room than into the private office or behind the sales counter of the appellees. An injury sustained from defective machinery by one visiting a coal shaft to secure employment was held to create no liability, the visitor being only a licensee. *Larmore v. Iron Co.*, 101 N. Y. 391, 4 N. E. Rep. 752. In *Converse v. Walker*, 30 Hun. 596, it was held that one who took refuge in an hotel to escape a thunder storm, and was injured by a defective balcony, was but a licensee, and could not recover. *Bedell v. Berkey*, 76 Mich. 435, 43 N. W. Rep. 308, was an action for an injury sustained in falling into an elevator shaft upon the defendant's premises—a storeroom; and it was held that, although the plaintiff visited the store on business, if he strayed about over the premises at

his own will, peering into dark recesses, he was bound to look out for his own safety. The case of *Trask v. Shotwell*, 41 Minn. 66, 42 N. W. Rep. 699, is one in most respects like the case under consideration, but, in the one respect of the injured person having business upon the premises in connection with the proprietors, much stronger than this case. The plaintiff bought goods of a wholesale firm, and sent his nephew after them. When the messenger arrived, he was directed to the alley door of the shipping room, and, arriving there, knocked, and the door was opened. He then gave directions to the teamster, closed the door, and walked into the building, and passing about, fell into the elevator shaft, and sustained injuries from which he died. It was held that the defendant owed no duty to the deceased to keep the freight elevator guarded and, that the court did not err in directing a verdict for the defendants. In *Railway Co. v. Barnhart*, 115 Ind. 399, 16 N. E. Rep. 121, it is said by this court: "Where a person has a license to go upon the grounds or inclosures of another, he takes the premises as he finds them, and accepts whatever perils he incurs in the use of such license; but when the owner or occupant, by enticement, allurement, or inducement, whether express or implied, causes another to come upon his lands, he then assumes the obligation of providing for the safety and protection of the person so coming, and for any breach of duty in that respect such owner or occupant becomes liable for any injury which may result to the person so caused to come onto his lands. The enticement, allurement, or inducement, as the case may be, must be the equivalent of an express or implied invitation. Mere acquiescence in the use of one's lands by another is not sufficient." Many authorities will be found cited by the courts in support of the propositions we have quoted. In the case in review there is no claim of an express invitation and we cannot imply an invitation to the appellant to there search for a drayman from the mere fact that appellees were engaged as merchants, with their doors thrown open to purchasers, or possibly to those who go

"From shop to shop,
Wondering, and littering with unfolded sliks
The polished counters."

Judge Charles A. Ray, formerly of this court, in his excellent work on the Negligence of Imposed Duties (pages 18, 19), says: "The keeper of a public place of business is bound to keep his premises, and the passageway to and from them, in a safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. But this rule only applies to such parts of the building as are a part of, or used to gain access to, or constitute a passageway to and from, the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by invitation or allurement of the owner, express or implied, to enter therein." In *Bennett v. Rail-*

road Co., 102 U. S. 577, it is said (on page 584): "It is sometimes difficult to determine whether the circumstances make a case of 'invitation,' in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. 'The principle,' says Mr. Campbell in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.'" While this case is cited with approval in *Railway Co. v. Barnhart*, *supra*, we need not fully approve this distinction, for here the appellant went upon the premises on business wholly his own; his entrance was through an unusual passage; the injury was sustained while entering a part of appellees' premises not shown to have been frequented by customers or visitors; and his presence is not shown to have been known to or observed by appellees. Nor is it necessary for us to hold, as appellees insist, that appellant was a trespasser. If only a licensee, the rule, properly applied precludes recovery. We find no error in the direction of a verdict for the appellees, and the judgment of the lower court is affirmed.

NOTE.—When one party sues another for damages for injuries sustained to his person from some accident, his claim is predicated on the assumption that such accident was caused by the neglect of the duty, which the defendant owed to the plaintiff to guard him from such injury. As stated in the principal case, if there was no duty there can be no cause of action. When one party invites another to enter upon his premises, he owes a duty to the latter to render such premises reasonably safe. *Atlanta, etc. Co. v. Coffey*, 80 Ga. 145. A party who is on the premises in order to transact business, or to fulfill a contract with the proprietor, is considered to be there by the invitation of such proprietor. A customer, whether buying goods or not, is entitled to reasonable care to prevent injury from unusual danger, of which the occupier owes or ought to know. *Indemaur v. Dames*, L. R. 1 C. P. 274. When invited parties come on premises where they are not acquainted with the dangers that are likely to incur, it is the duty of the owner to put up some safeguard or to give such parties proper notice of the dangers. *S. C., L. R. 2 C. P. 311*. Such parties have a right to believe that all reasonable care has been used protect them against injury. *Sterger v. Van Sicken*, 132 N. Y. 499. The entrances to an elevator in a business house, when it was in use, were left open, but it did not appear that there was any necessity for not barring such entrances when the elevator was not in use. A gas-fitter who was engaged in examining the gas-fixtures in such house, fell down the elevator shaft through such an entrance at a time when the elevator was not in use. It was considered that the proprietor had not exercised due care. *Indemaur v. Dames*, L. R. 1 C. P. 274. An employee, who goes on premises to carry out a contract of his employer with the owner, is there on lawful business and is entitled to the same care, which should be bestowed on his employer as being there by invitation. *S. C., L. R. 2 C. P. 311*. Parties, who can claim such care from the owner of premises, are those who are expressly invited to enter thereon or are induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some

preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon. *Sweeney v. Old Colony*, etc. R. R. Co., 10 Allen, 368. If such parties are on the premises without express invitation, an invitation will not be implied, unless they go there to transact business with the occupants thereof. A party who went to a railroad station, not to travel nor to welcome a coming or speed a parting guest, but merely to gratify curiosity had no claim against the railroad, because a platform, on which a large number of people had collected to see the President of the United States, fell and injured him. *Gillis v. Railroad*, 59 Pa. St. 129. A party paid a social visit to a telegraph operator and was killed by the upsetting of the telegraph office by cars, which were thrown from the track by a collision. The railroad was exempted from all liability to his representatives. *Woolwine v. Chesapeake*, etc. R. R., 36 W. Va. 329. A party went to a station at night to take a train, and, after learning that the last train had departed, remained at the station for several minutes for his own convenience. In the meantime the regular hour of closing having arrived, the station-master put out the lights. The stranger in leaving the station was injured, which would not have occurred if the lights had not been extinguished. He was denied all right of action against the railroad, because he was at the station at the time of the accident merely for his own purposes. *Heinlein v. Boston*, etc. R. R., 147 Mass. 136. A party went to a factory on his private business and inquiring for an employee was told he was in another room, and in going there was injured. It was adjudged, that he was not on the premises by invitation and had no cause of action for the injury. *Galveston Oil Co. v. Morton*, 70 Tex. 400. The same rule was enforced in the case of a similar accident when the business concerned the owner of the premises, but such party sought the employee in a factory, where no outsiders were allowed to enter, and wherein such party had never been before. *Flannigan v. American G. Co.*, 11 N. Y. Sup. 688. A party, who goes into a shop or factory on business and intermeddles or goes into places not apparently designed for customers or visitors, and is injured, can assert no claim for damages against the proprietor. *Zoebish v. Tarbell*, 10 Allen, 385; *Gilbert v. Nagle*, 118 Mass. 278. Such party has no right to choose for himself his means of ingress or egress, and, if he roams around other people's premises at his own will he must look out for his own safety. *Bedell v. Berkey*, 76 Mich. 435. When such party is aware of the danger he must exercise proper care on his part and cannot claim damages should he be injured. *Eisenberg v. Mo. Pac. R. R.*, 33 Mo. App. 85.

Licensee-Injury.—Since the obligation to respond in damages only arises from the neglect of a duty toward the injured, a trespasser, who comes upon the land of another, cannot maintain an action, if he runs against a barrier or falls into an excavation. So a licensee, who enters on premises by permission only, without any enticement, allurements or inducement, being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. There is no duty on the occupant to keep his premises in suitable condition for those who come there solely for their own convenience or pleasure. *Sweeney v. Old Colony*, etc. R. R., 10 Allen, 368. A licensee enters upon the property at his own risk and takes the premises as he finds them. *Sterger v. Van Sicklen*, 132 N. Y. 499. An open hole, concealed only by the darkness of the night, is a danger, which

a licensee must avoid at his own peril. *Reardon v. Thompson*, 149 Mass. 267; *Redigan v. Boston*, etc. R. R., 155 Mass. 44. The mere fact, that the owner does not interfere when another goes on his premises, cannot be construed into an invitation to enter thereon. Where the public were in the habit of crossing a railroad platform, which was evidently constructed for other purposes, in order to make a short cut, a lady, who in crossing in the dark fell through an open trap-door leading into the basement, who sued the railroad on the theory that such usage showed an invitation to the public to use such passage-way, was denied any remedy. *Redigan v. Boston*, etc. R. R., 155 Mass. 44. A boy passed through a shed, where defendants' employees were working, and climbed through a window thereof onto a roof, seeking his ball, and became entangled in the electric wires and was killed. The failure of such employees to forbid his action was not held to be equivalent to an invitation to go on the roof. *Sullivan v. Boston*, etc. R. R., 156 Mass. 378. Relative to a licensee an owner may arrange and use his property in any lawful manner and owes him no duty relative thereto, except to refrain from setting a trap for him and from doing him intentional or wanton harm. *Idem*. To hold the owner of the premises liable for an injury to a licensee, actual misconduct or wanton injury must be shown. *Woolwine v. Chesapeake*, etc. R. R., 36 W. Va. 329; *Boleh v. Smith*, 7 Hurl. & Nor. 736. Negligence or want of ordinary care will bar a suit for damages for personal injuries, and has often rendered unnecessary a decision as to whether the plaintiff was a mere licensee or was on the premises under an implied invitation. *Wilkinson v. Fairrie*, 1 Hurl. & Colt. 633; *Boleh v. Smith*, 7 Hurl. & Nor. 736; *Parker v. Portland P. Co.*, 69 Me. 173.

S. S. MERRILL.

WEEKLY DIGEST

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1. ACTION—Preventing Revocation of Will.—Where an attempted revocation of a will is thwarted by the fraudulent act of a beneficiary, and the testator is sub-

sequently and seasonably informed of the fact, and acquiesces in the preservation of the will, no action will lie for the alleged fraud.—*GRAHAM V. BURCH*, Minn., 55 N. W. Rep. 64.

2. **ADMIRALTY—Shipping—Charter Party.**—Where the charter party required the master to "sign shippers' bills of lading as presented without prejudiced to the charter party," he is bound to sign any usual bill presented describing goods actually delivered to the vessel, and a refusal to do so is a breach of the charter party, which entitles the shipper to such damages as may be shown; but such provision does not require the master to sign erroneous bills, and seek subsequent redress for shortage.—*THE TONGOT*, U. S. D. C. (Ala.), 55 Fed. Rep. 329.

3. **ADMIRALTY—Shipping—Delivery of Cargo.**—The contract in a charter party to discharge with "customary dispatch" is fulfilled if the vessel is afforded the customary facilities for speedy discharge; and hence, when charterers furnish ample dock room for a vessel, but the latter, either through misapprehension on the part of her stevedore or acting under direction of the consignees of the cargo, given without the knowledge of the charterers, so discharge her cargo as to block the dock, and thus occasion delay, the charterers are not liable for demurrage.—*SEAGAR V. NEW YORK & C. MAIL STEAMSHIP CO.*, U. S. D. C. (N. Y.), 55 Fed. Rep. 324.

4. **ADMIRALTY—Seamen—Negligence.**—The maritime law gives a seamen no right to recover damages for permanent disabilities caused by the negligence of the ship's officers, but he is entitled, on the other hand, irrespective of any negligence on his own part or on the part of fellow-seamen, to recover wages to the end of the voyage, and to be cured at the ship's expense, so far as cure is possible.—*THE GOVERNOR AMES*, U. S. D. C. (Wash.), 55 Fed. Rep. 327.

5. **APPEARANCE—Effect.**—An appearance by a person served out of the State for the purpose of objecting to the assumption by the court of jurisdiction over his person constitutes an appearance for all purposes.—*PAGE V. POTTER*, Tex., 22 S. W. Rep. 800.

6. **ASSIGNMENT FOR BENEFIT OF CREDITORS.**—Under Mass. Dig. § 305, which prohibits an assignee for the benefit of creditors from taking possession until after the filing of an inventory of the property, and a bond, with the clerk of a court, it is the duty of the assignor to remain in the control of the property, and protect it, until the inventory and bond are completed; and the taking of exclusive possession by the assignee before that time, though for the purpose of making the inventory, avoids the assignment.—*SMITH V. PATTERSON*, Ark., 22 S. W. Rep. 342.

7. **ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.**—The fact that, on the day of an assignment for the benefit of creditors, judgments were confessed against the assignor on instruments executed by him from two months to four years before, and that on that day entry was made on the books of a corporation of assignments of stock previously made to creditors, does not constitute the entering of judgment and transferring of stock part of the general assignment, and therefore render it void, as an attempt to make a general assignment, with preferences, in violation of Code, § 2115.—*LE MONYNE V. BRADEN*, Iowa, 55 N. W. Rep. 14.

8. **ASSOCIATION—Benevolent Societies.**—A number of persons belonging to a benevolent society were killed and injured by a cyclone, and a call was made on the different branches of the society for financial aid for the sufferers: Held, that the money sent to the society in response to the call was given it in trust, to be distributed among the sufferers in proportion to their necessities, and the society had no discretion as to how much should be distributed, but was bound to distribute the whole sum.—*SUPREME LODGE KNIGHTS & LADIES OF HONOR V. OWENS*, Ky., 22 S. W. Rep. 327.

9. **ATTACHMENT—Bond.**—An attachment bond is sufficient where it is signed by plaintiffs, and below their

names are those of two others, without stating in what capacity they sign, as it is apparent that such persons are the sureties required by law, though the spaces in the body of the bond for sureties' names are blank.—*WEIS V. CHIPMAN*, Tex., 22 S. W. Rep. 225.

10. **ATTACHMENT—Equity Practice.**—In attachment in chancery against property alleged to belong to non-resident debtors, complainants, who asked for no order of publication against such non-residents, who failed to serve them personally with process, and who consented to the hearing of a motion to abate the attachment made by the claimant of the property, cannot object to a decree abating the attachment on the ground that no process, personal or by publication, had been executed against the non-resident defendants.—*KERN V. WYATT*, Va., 17 S. W. Rep. 549.

11. **ATTORNEY AND CLIENT—Counties—Contract.**—An attorney agreed, in writing to appear for the county board in pending litigation respecting certain county bonds, and the board paid him therefor. At the same time the board orally agreed to retain him in certain contemplated litigation regarding other county bonds, and pay him therefor. This oral agreement the board, in open session, promised to enter in their records, but did not do so. The attorney successfully conducted the litigation referred to in the oral agreement, and the county received the benefit thereof: Held, that the oral agreement, relating to litigation distinct from that in the written agreement, might be proved by the testimony of the attorney and the members of the board.—*FRANKLIN COUNTY V. LAYMAN*, Ill., 33 N. E. Rep. 1094.

12. **BOUNDARIES—Evidence.**—Where there is a discrepancy, in a government survey, between the monuments and the distances given in the field notes, the monuments will control, even though the result be that some of the quarter sections will contain less than their proper number of acres.—*OGILVIE V. COPELAND*, Ill., 33 N. E. Rep. 1085.

13. **BOUNDARIES—Evidence.**—Where the field notes of a survey are inconsistent, the true description of the survey may be shown by the evidence of the surveyor who made it.—*SCHLEY V. BLUM*, Tex., 22 S. W. Rep. 264.

14. **CHattel MORTGAGE.**—The record of a bill of sale, which is intended merely as security for a debt, and filed as a chattel mortgage, but not duly acknowledged, is not constructive notice to creditors and subsequent mortgagees or purchasers.—*ST. PAUL TITLE INSURANCE & TRUST CO. V. BERKEY*, Minn., 55 N. W. Rep. 60.

15. **CONSTITUTIONAL LAW—Fencing of Railroad.**—A State statute, which, is construed by the courts of the State, gives damages to a land-owner for the expense and inconveniences of watching cattle to keep them from going upon a railroad track running through his land which the company has failed to fence (Gen. Laws Minn. 1877, ch. 73), is within the police power of the State, and is not subject to the inhibition of the fourteenth amendment to the federal constitution, against depriving any person of the equal protection of the laws, even though, by the general law of the State, penalties and damages are given only for direct injuries sought to be prevented, and do not extend to consequential and possible resulting injuries.—*MINNEAPOLIS & ST. L. RY. CO. V. EMMONS*, U. S. S. C., 13 S. C. Rep. 370.

16. **CONSTITUTIONAL LAW—Title of Act—Gaming.**—Laws 1889, p. 104 (Rev. St. 1889, § 4597), is entitled: "Dram Shops—Gambling Devices in. An act to prevent any dram shop keeper from keeping, or permitting to be kept, in or about his dramshop, certain musical instruments; any billiard, pool, or other gaming table; bowling or ten pin alley; cards, dice, or other device for gaming or amusement." Held, that its title sufficiently expresses its subject, although section 1 prohibits sparring, boxing, wrestling, and cockfighting in dramshops.—*STATE V. BLACKSTONE*, Mo., 22 S. W. Rep. 370.

17. **CONSTITUTIONAL LAW—Title of Acts—Acts 1891-92, p. 626, entitled "An act to prevent and punish gam-**

bling, and the making, writing, or selling of books or pools or mutuels on the result of any trotting race of horses, or race of any kind, or on any election, or any contest of any kind, or game of baseball," has for its general object the suppression of certain kinds of betting or gambling; and the fact that the body of the act makes it an offense, not only to bet in the prohibited modes, but also to keep a house for the purpose of such betting therein, does not render the act void as embracing more than one object, which was not expressed in the title.—*LESCALLETT V. COMMONWEALTH, Va.*, 17 S. E. Rep. 546.

18. **CONTRACT—Pleading.**—In an action on a contract obligating plaintiff to assign to defendant, on request, "all inventions and letters patent" obtained by plaintiff which may be useful in defendant's business, and requiring defendant to pay plaintiff one-half the net profits arising from the sale of goods manufactured under the patents, a complaint which alleges that plaintiff assigned the patents, and that defendants used them, and made net profits by such use, is sufficient, without also alleging an assignment of "all inventions," since the court cannot assume that defendant requested their assignment, and that plaintiff refused.—*DALZELL V. FAHYS WATCH-CASE CO., N. Y.*, 33 N. E. Rep. 1071.

19. **CONTRACT—Subscriptions—Construction.**—An agreement by which persons subscribe for the purpose of inducing the construction of a railroad, though reciting that "we, the undersigned, hereby promise and agree," is a several obligation, it providing that "each subscriber" should "be liable only for the amount opposite his name."—*DARNALL V. LYON, Tex.*, 22 S. W. Rep. 304.

20. **CONTRACT FOR SERVICES—Wrongful Discharge.**—Where, in an action for wrongful discharge, a writing which defendant contends is a release from liability does not on its face purport to be such release, but only a receipt for money paid for services rendered, an instruction submitting the construction of such writing to the jury, if erroneous, is not prejudicial to defendant.—*BLUEFIELDS BANANA CO. V. WOLFE, Tex.*, 22 S. W. Rep. 269.

21. **CONTRACTS—Public Policy.**—An agreement by a person to make another, not related to him, his heir, is against the policy of the common law, and where the procedure prescribed by Gen. St. ch. 31, § 17, authorizing the adoption of a legal heir on certain condition by petition to the county court has not been followed, such agreement will not be enforced, nor will an action lie for its breach.—*DAVIS V. JONES' ADM'R, Ky.*, 22 S. W. Rep. 331.

22. **CORPORATION—Foreign Corporations.**—The sale of brick in another State, to be delivered in Alabama, is an act of interstate commerce, which is not affected by laws of Alabama requiring foreign corporations to have a place of business and an agent in the State as a condition precedent to doing business therein.—*COOK V. ROME BRICK CO., Ala.*, 12 South. Rep. 918.

23. **CORPORATIONS—Increasing Stock.**—The stock of corporations cannot be increased except by compliance with requirements of Act 26 of 1882, and until those requirements have been fulfilled, the increased stock has no existence.—*LINCOLN V. NEW ORLEANS EXP. CO., La.*, 12 South. Rep. 937.

24. **COURTS—Equity Jurisdiction.**—Under Const. art. 5, § 8, as amended in 1891, which gives the district courts "general equitable jurisdiction over all causes of action whatever, for which a remedy or jurisdiction is not provided by law or the constitution," the district court has jurisdiction of a suit against a judgment debtor for discovery of assets, where an execution has been returned unsatisfied, and an abstract of the judgment recorded so as to be a lien on land, and the petition alleges that the judgment debtor has property subject to the satisfaction of the judgment, the kind and description of the property being unknown to the judgment creditor.—*KOUNTZE V. CARGILL, Tex.*, 22 S. W. Rep. 227.

25. **COVENANTS—Building Restrictions—Conveyances.**—An agreement among adjacent lot owners, covenanting to reserve an open space in front of their lots, and not to build thereon, is a conveyance, within 1 Rev. St. p. 762, § 38, providing that the term "conveyance" embraces every instrument in writing by which any estate or interest in real estate is created or aliened, or by which the title may be affected, and, when executed by a married woman it must be acknowledged by her apart from her husband, as required by 758, § 10, to entitle it to be recorded.—*BRADLEY V. WALKER, N. Y.*, 33 N. E. Rep. 1079.

26. **CRIMINAL EVIDENCE—Dying Declarations.**—Declarations made by decedent three days before death, after being informed by a physician that her entrails were cut, and after her repeated expressions of opinion that she could not recover, were admissible in evidence.—*STATE V. UMBLE, Mo.*, 22 S. W. Rep. 378.

27. **CRIMINAL EVIDENCE—Dying Declarations.**—On a murder trial, declarations made by deceased after stating that he was going to die, as to the circumstances of a beating inflicted on him by defendant, are not admissible as dying declarations, when made after deceased had walked around the neighborhood, three days before he took to his bed, and eight days before his death.—*MCLEAN V. STATE, Miss.*, 12 South. Rep. 905.

28. **CRIMINAL EVIDENCE—Dying Declarations.**—In cases of homicide it is essential to the admissibility of dying declarations of the deceased that they were made under a sense of impending death, and this is a preliminary fact to be shown to the court by the party offering them. This question is one of law, to be exclusively decided by the court, and the accused has the right to have the decision of the court directly upon the point. It is error for the court to avoid the decision, and shift the responsibility upon the jury.—*ROTEN V. STATE, Fla.*, 12 South. Rep. 910.

29. **CRIMINAL EVIDENCE—Lewdness.**—On trial of an indictment for lewdness, committed by the wilful exposure of defendant's person on a particular day, in a public place, in the presence of the prosecuting witness, it is not error to admit evidence of similar acts by the defendant at the same place, on the same day, and on the preceding day, and in the presence of other persons than the prosecuting witness, where, by instructions, the consideration of such evidence is limited to the determination of whether or not the act charged was not wilfully done.—*STATE V. STICE, Iowa*, 55 N. W. Rep. 17.

30. **CRIMINAL LAW—Bill of Exceptions.**—Under Rev. St. 1889, § 2168 (which, by section 4221, is made applicable in criminal cases), permitting bills of exceptions to be filed within such time after the term as the court may allow by an order entered of record, which time may be "extended" by the court or judge in vacation, for good cause shown, an order extending the time for filing a bill cannot be made by a judge after the time which has been allowed therefor has expired.—*STATE V. APPERSON, Mo.*, 22 S. W. Rep. 375.

31. **CRIMINAL LAW—Conviction of Second Offense.**—Rev. St. 1889, § 3959, provides for the punishment of any person convicted of petit larceny, upon a subsequent conviction thereof, by imprisonment in the penitentiary: Held, that the first conviction can be proved only by the judgment so reciting, and not by a record of a justice, reciting the arrest and conviction of defendant, without naming the offense, nor by the commitment, inferentially showing that the offense was petit larceny.—*STATE V. BROWN, Mo.*, 22 S. W. Rep. 367.

32. **CRIMINAL LAW—Indictment.**—It is not sufficient ground to quash an indictment that the indicted persons appeared before the grand jury, and were interrogated as witnesses—they having been at the time incarcerated in jail under capias from the recorder's court; the proof disclosing that at the time each was examined he was informed that he had the right to decline to make answers to such questions as might tend to incriminate himself, or render him liable to a

criminal prosecution.—*STATE V. DONELON*, La., 12 South. Rep. 922.

33. **CRIMINAL LAW—New Trial.**—On a trial for bribing a witness the evidence for the prosecution was that the offer to bribe was made in a saloon, in the presence of the proprietor, who took part in the conversation; such saloon being in the city where trial was held. Defendant denied the conversation. On motion for new trial on the ground of newly-discovered evidence, defendant offered the affidavit of the proprietor, stating that he was not acquainted with the witness, that the conversation testified to never took place, and that these facts were not imparted to defendant until after his conviction: Held, that such affidavit was not sufficient to warrant the granting of a new trial.—*STATE V. MYERS*, Mo., 22 S. W. Rep. 382.

34. **CRIMINAL PRACTICE—Autrefois Acquit.**—The plea of *autrefois acquit* involves questions of mixed law and fact, and, when not demurrable on its face, is properly referred to a jury.—*STATE V. WILLIAMS*, La., 12 South. Rep. 932.

35. **CRIMINAL PRACTICE—Assault with Intent to Kill.**—An indictment charging defendant with aiding and abetting another in an assault with intent to kill is bad, for failure to allege that he "feloniously" aided and abetted in the crime.—*STATE V. HANG TONG*, Mo., 22 S. W. Rep. 381.

36. **CRIMINAL PRACTICE—Burglary—Venue.**—To support a conviction of burglary the evidence must show, either directly or indirectly, the venue of the offense.—*HARLAN V. STATE*, Ind., 33 N. E. Rep. 1102.

37. **CRIMINAL TRIAL—Accused as Witness.**—On a prosecution for receiving stolen money, defendant testified in chief that he had certain money, but did not state where he got it, or whether he was guilty as charged. He stated on cross-examination that he worked for it, and got it in a game: Held, that it was error to permit the prosecuting attorney to remark in his argument that defendant did not deny, that he received the money from the person who stole it, that he did not deny his guilt, and that his attorney did not dare to ask him these questions.—*STATE V. ELMER*, Mo., 22 S. W. Rep. 380.

38. **CRIMINAL TRIAL—Evidence—Witness.**—If the defendant in a criminal case, jointly indicted and tried with another defendant charged with the same offense, avails himself of the privilege given him by the statute, of testifying in his own behalf, and he incriminates his codefendant, he is to be regarded and treated as any other witness. Therefore his character for honesty may be put at issue by his codefendant, whom he seeks to inculpate, in an examination as to the general character of the witness for truth and veracity.—*STATE V. TAYLOR*, La., 12 South. Rep. 927.

39. **DEATH BY WRONGFUL ACT—Conflict of Laws.**—Since the laws of Mexico do not give a right of action for death caused by the wrongful act of another, no action can be maintained in Texas for the negligence of a railroad within that country, which resulted in the death of one of its employees, though the death occurred within the State.—*DE HAM V. MEXICAN NAT. R. Co.*, Tex., 22 S. W. Rep. 249.

40. **DEATH BY WRONGFUL ACT—Jurisdiction.**—Where a cause of action for death by wrongful act accrued in Minnesota, by whose laws the right of action is given the personal representative for the benefit of the widow and next of kin, an appointee of the Missouri court could not maintain an action therein; for, as the right of action was given in contravention of the common law, and was dependent alone upon the statute creating it, the right must be taken with the limitations placed upon the remedy, and it was therefore not competent for the Missouri legislature to authorize any one to bring the suit other than the person designated by the Minnesota laws.—*WILSON V. TOOTLE*, U. S. C. C. (Mo.), 55 Fed. Rep. 219.

41. **DEED—Cancellation—Undue Influence.**—Plaintiff, a woman 87 years old, and of limited information and intelligence, conveyed in fee, for an inadequate con-

sideration, her property to defendant, reserving to herself only a life estate, believing that the deed she executed was a will. Defendant's father and mother were confidential friends of plaintiff, and defendant's father had, as attorney, transacted business for her: Held, a sufficient showing of the existence of confidential relation, and undue influence arising therefrom, to warrant setting aside of the conveyance.—*ARMSTRONG V. LOGAN*, Mo., 22 S. W. Rep. 384.

42. **DEED—Description.**—A deed of a portion of a platted lot, describing the granted premises as extending west 72 feet from the northeast corner of the lot, fixes the beginning point, not at the center of the street on which the lot abuts, but at that portion of the platted territory, set apart for individual and separate use, though the plat, in giving the size of the lots, measures to the center of the street.—*MONTGOMERY V. HINDS*, Ind., 33 N. E. Rep. 1100.

43. **DEED—Escrow.**—Where persons executing deeds to each other leave them in the hands of a third person until they get proper abstracts of title, reserving to themselves the determination of whether the abstracts are proper, they will be held to have been left in escrow, and not delivered, though each party took immediate possession under the deed to him.—*HOTT V. MCLAGAN*, Iowa, 55 N. W. Rep. 18.

44. **DEED—To Catholic Bishop.**—A deed to the bishop of a Roman Catholic church for the benefit of the church vests the complete legal title in the bishop, and the land is not forfeited to the grantor by failure to occupy and use it for the church.—*GABERT V. OLCOTT*, Tex., 22 S. W. Rep. 286.

45. **DEED OF TRUST—Unrecorded Assignment.**—In a suit to set aside the satisfaction of a trust deed, it appeared that defendant M borrowed money of defendant D, and gave notes payable to D's wife, secured by the deed to D, as trustee. D sold the notes to plaintiff, a nonresident, of which M had knowledge. Afterwards, and before maturity, M paid D the amount of the notes, who, with his wife, satisfied the deed on the margin of the record, and embezzled the money: Held, that as M knew plaintiff was the owner of the notes, though his assignment thereof was unrecorded, M was liable for their amount, since through his negligence D was enabled to embezzle his payment.—*LIVERMORE V. MAXWELL*, Iowa, 55 N. W. Rep. 37.

46. **EJECTMENT—Tax Sale—Redemption.**—A tax deed to premises while they are in possession of a life tenant, the widow of the former owner, and before her right of redemption expires, gives the grantee therein no title, as against her.—*LITTLE V. EDWARDS*, Wis., 55 N. W. Rep. 48.

47. **EVIDENCE—Action to Recover Land.**—Where the action to recover a strip of land between adjoining premises, and for damages because of defendant's wrongful possession and use thereof, is based on the claim that the strip is embraced within the description in plaintiff's grant, evidence of a conventional boundary and adverse possession thereunder is admissible, though allegations of such facts are embraced in the count of the principal cause of action.—*VAN SICKLE V. KEITH*, Iowa, 55 N. W. Rep. 42.

48. **EVIDENCE—Ancient Document—Proper Depository.**—An ancient document transferring a head-right certificate, free from suspicion, and over 30 years old, found in the county clerk's office, in an old package of deeds, should be admitted in evidence, when accompanied with an offer to prove the genuineness of the signature of one of the attesting witnesses, though the clerk of the court is not the proper depository for such documents.—*HARRIS V. HOSKINS*, Tex., 22 S. W. Rep. 251.

49. **EVIDENCE—Parol Gift of Land.**—Parol evidence of a former owner, showing a verbal gift of land to railroad for right of way, although not admissible to establish an easement therein, is admissible for the purpose of showing that the possession of the railroad was adverse.—*SHEPARD V. GALVESTON, H. & H. R. Co.*, Tex., 22 S. W. Rep. 267.

50. EVIDENCE — Statements to Physicians.—Statements made to an attending physician by an injured party in respect to his injuries and pain suffered by him, held competent evidence in connection with his examination and observation of the patient.—*BRUSCH V. ST. PAUL CITY Ry. Co.*, Minn., 55 N. W. Rep. 57.

51. FEDERAL COURTS — Equity Jurisdiction.—Simple contract creditors, who have not reduced their claims to judgment, have no standing in the United States Circuit Court, sitting as a court of equity, on a bill to vacate a fraudulent assignment for the benefit of creditors, though by Code, Miss. 1880, §§ 1843, 1845, the State courts of chancery are given jurisdiction of bills of creditors, who have not obtained judgments at law, to vacate such assignments, and subject the property to their demands.—*CATES V. ALLEN*, U. S. S. C., 13 S. C. Rep. 883.

52. FIXTURES—Landlord and Tenant—Electric Lighting Plant.—Certain land, with water power, was leased for use in the operation of an electric lighting plant, and the lessee built on a solid stone foundation laid with mortar a substantial dynamo house, in which he placed two dynamos; also a boiler house of rough lumber upon sills laid on stone or blocks, and a shaft house or shed, constructed for the most part of old lumber from buildings on the premises. He also erected a shafting 29 feet long, resting upon trestles embedded in the ground to the depth of two feet: Held, that the buildings as well as the machinery were accessory to the trade, and therefore trade fixtures subject to removal by the lessee on the termination of his lease.—*BROWN V. RENO ELECTRIC LIGHT & POWER CO.*, U. S. C. C. (Nev.), 55 Fed. Rep. 229.

53. FRAUDS, STATUTE OF — Guaranty.—Though Code Ala. 1887, § 1732, provides that a special promise to answer for the debt of another is void "unless such agreement expressing the consideration is in writing," etc., a guaranty of a negotiable note written by a third person on the note before its delivery need express no consideration, for the guaranty requires no other consideration than that which the note on its face implies to have passed between the original parties.—*MOSES V. NATIONAL BANK OF LAWRENCE COUNTY*, U. S. S. C., 13 S. C. Rep. 900.

54. FRAUDULENT CONVEYANCE—Pleading.—Gen. St. § 2014, provides that no insolvent debtor shall, in assigning for the benefit of creditors, prefer one creditor over others. Section 2015 provides that if any person who is insolvent, within 90 days before the making of an assignment, with a view to prefer a creditor, conveys property to him, and such creditor has reasonable cause to believe him insolvent, and the conveyance in fraud of creditors, such conveyances shall be void: Held, that a petition in an action by a creditor of an insolvent debtor to set aside, on the ground of fraud, a conveyance by such debtor of his property, which fails to allege that the grantee was a "creditor," falls to state a cause of action, within sections 2014 and 2015.—*MCGAHAN V. CRAWFORD*, S. Car., 17 S. E. Rep. 561.

55. GIFT—Certificate of Deposit.—A man deposited his own money in a bank, taking a certificate of deposit payable to the order of a woman with whom he was on friendly terms, though there was no relationship or engagement of marriage between them. He told no one about the deposit, and kept the certificate in his own possession till his death, eight months after: Held, that title did not pass to the payee of the certificate, since the evidence did not show either an intent to make a gift or a delivery of the subject of the gift.—*TELFORD V. PATTON*, Ill., 33 N. E. Rep. 1119.

56. GUARANTY — Notice of Default.—The contract under which plaintiff furnished supplies to A provided that monthly settlements should be made therefor, and defendant executed a bond guarantying payment: Held, that the fact that A failed to make settlement at the end of the first month as provided by contract, and that plaintiff did not notify defendant thereof, was no bar to a right to recover of defendant for supplies fur-

nished A after his default, where A was notoriously insolvent at the time defendant executed the bond, to defendant's knowledge.—*CORSICANA ICE & REFRIGERATING CO. V. ANDERSON*, Tex., 22 S. W. Rep. 292.

57. GUARDIAN AND WARD—Claims.—Where a person has a legal and equitable claim against the estate of an infant ward, he may present his claim against the guardian in the probate court having jurisdiction of the estate of the ward and of the person of the guardian, and secure an order of such court for the payment of such amount out of the trust estate as the court may, in its discretion, see fit.—*TURNER V. FLAGG, Ind.*, 33 N. E. Rep. 1104.

58. HIGHWAYS — Proceedings to Establish.—Code, § 940, relating to highways, provides that when claims for damages are filed, and on the day appointed for filing the same, the auditor must appoint three appraisers to view the ground on the day fixed by him, and report the damages sustained by the claimants; such report to be filed in the auditor's office within 30 days after the appointment: Held that, where appraisers were appointed prior to the day appointed for filing claims, without notice to the claimants, the proceedings were illegal.—*ABNEY V. CLARK*, Iowa, 55 N. W. Rep. 6.

59. HIGHWAYS — Vacation — Fraud.—Persons who, after having claimed to have discovered fraud in the establishment of a highway, seek to have the way vacated on the ground that it is not of public utility, and prosecute the matter to final determination, must be deemed to have waived the fraud by their delay, and cannot afterwards, on being defeated, institute another proceeding to have the way vacated for the fraud.—*LIMMING V. BARNETT, Ind.*, 33 N. E. Rep. 1038.

60. INJUNCTION AGAINST OPENING STREET.—Since an owner of land condemned for a street, having knowledge of the action of the city council, could have protected his interests by *certiorari*, and, being made a party to the condemnation proceedings, could have defended on the ground that the proceedings were not authorized by the action of the council, he is not entitled to have the opening of the street enjoined for defects in the proceedings of the council.—*ROCKWELL V. BOWERS*, Iowa, 55 N. W. Rep. 1.

61. INJUNCTION—Bond.—Where a petition for injunction alleges that plaintiffs are annoyed by the smoke, and their sawmill endangered by the sparks, from defendants' "slab burner," and the fiat and writ restrict its use so as not to endanger plaintiffs' mill, or interfere with their business by smoke, defendants are not required to shut down their mill, or cease using the burner and, in an action on the injunction bond cannot charge plaintiffs with the loss resulting from their voluntary act in doing so, where its use can be continued without doing the injury specified.—*BANCROFT V. RUSSELL*, Tex., 22 S. W. Rep. 240.

62. INJUNCTION—Pleadings.—It appearing, upon the trial of a motion to dissolve an injunction obtained by a lessee against the lessor to prevent dispossession of leased premises, that the latter had previously obtained a judgment evicting the lessee, as contumacious, it will be dissolved.—*MENGELLE V. ABADIE*, La., 12 South. Rep. 921.

63. INNKEEPER'S LIEN.—An innkeeper's lien attaches to goods in the possession of his guest though they belong to a stranger, provided the innkeeper has no notice of that fact.—*SINGER MANUFACTURING CO. V. MILLER*, Minn., 55 N. W. Rep. 56.

64. INSURANCE—Construction of Policy.—A policy of insurance on certain whiskies to be shipped was made "as per form attached," and by the attached form the insurer's liability was limited to the excess in value over \$20 per barrel, carriers to have the right to limit their liability for loss to \$20 per barrel, and the insured to have the right, on collecting that sum from the carrier, to give a release from all liability. The body of the policy, however, contained a provision that any claim against the carrier for loss should be assigned to the insurer: Held, that the provisions of the attached

form must prevail over the inconsistent provisions contained in the body of the policy, and that it was no defense to an action on the policy that the shipper, by accepting a bill of lading providing that the carrier should have the benefit of all insurance on the goods, had destroyed the insurer's right of subrogation.—*ST. PAUL FIRE & MARINE INS. CO. V. KIDD*, U. S. C. C. of App., 55 Fed. Rep. 238.

65. INTOXICATING LIQUORS—Evidence.—On a trial for selling liquor in violation of a town ordinance, it is error to admit evidence of two distinct sales.—*NAUL V. STATE*, Miss., 12 South. Rep. 903.

66. INTOXICATING LIQUOR—Illegal Sales.—An indictment charging that a sale of whisky was made without authority of law is sufficient under the general law of Mississippi.—*WEST V. STATE*, Miss., 12 South. Rep. 903.

67. INTOXICATING LIQUORS—Illegal Sales.—Defendant, in a local option city, told persons they could order liquor from a dealer in another city, and gave them blank orders, which they filed out, signed, and gave to him to forward. They instructed the dealer to send a certain quantity of liquor to the signers in the care of defendant. The liquor was shipped to defendant, who delivered it part at a time, receiving the money for such part as he delivered: Held that, if defendant acted as agent of the persons who ordered the liquor, he was not guilty of selling, but if he acted as agent of the dealer he was guilty.—*STATE V. WINGFIELD*, Mo., 22 S. W. Rep. 363.

68. JUDGMENT.—Where a judgment has been erroneously entered against a defendant by default, the court has no power at a subsequent term to set aside the judgment, and order a new citation to issue.—*BREWSTER V. NORFLEET*, Tex., 22 S. W. Rep. 226.

69. JUDGMENT—Collateral Attack.—In a suit to foreclose the lien of a drainage assessment, where the assessment has been confirmed by a court having jurisdiction of the parties and the subject-matter, it is no defense that the petition upon which the assessment was confirmed did not contain proper allegations, since the judgment of confirmation is conclusive as to the regularity of the petition, under Rev. St. 1891, ch. 42, § 34½, which declares that such judgment "shall be conclusive that all prior proceedings were regular and according to law."—*RIEBLING V. PEOPLE*, Ill., 33 N. E. Rep. 1090.

70. JUDGMENT—Res Judicata.—Where, in an action of trespass *quare clausum fregit*, the defenses of *liberum tenementum* and the statute of limitations are pleaded, and evidence in support of each defense is introduced, a judgment for the defendant upon a verdict of not guilty is at least *prima facie* evidence of a finding for the defendant on both issues.—*RHOADS V. CITY OF METROPOLIS*, Ill., 33 N. E. Rep. 1092.

71. MALICIOUS PROSECUTION—Probable Cause.—When information is given one upon which he institutes a criminal prosecution, and he at the time knows that upon inquiry of certain persons it may be ascertained that no offense has been committed, and there is no difficulty in making, nor other reasons for not making, such inquiry, he is to be charged, on the question of probable cause, with knowledge of such facts as he would have learned had he made the inquiry.—*BOYD V. MENDENHALL*, Minn., 55 N. W. Rep. 45.

72. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, however malicious may have been the private motives of the defendants in prosecuting the plaintiff upon a criminal charge, they are protected in doing so if there was probable cause to believe him guilty.—*SANDERS V. PALMER*, U. S. C. C. of App., 55 Fed. Rep. 217.

73. MANDAMUS—Jurisdiction of Federal Courts.—The United States Circuit Courts have no jurisdiction to issue writs of *mandamus*, even when, by the law of the State where the court sits, *mandamus* is regarded as a civil action, except in cases where the writ is ancillary to some other proceedings.—*GARES V. NORTHWEST NAT. BUILDING, L. & I. ASS'N*, U. S. C. C. (Oreg.), 55 Fed. Rep. 209.

74. MANDAMUS TO LAND COMMISSIONER.—*Mandamus* will not lie to compel a land commissioner to cancel a patent issued nearly 50 years ago, and issue another to petitioners, where it appears that a determination of their rights would involve doubtful questions of fact.—*TEAT V. MCGAUGHEY*, Tex., 22 S. W. Rep. 302.

75. MASTER AND SERVANT—Assumption of Risk.—The complaint in an action for injuries received in coupling a car by reason of a "stuck link," alleging that plaintiff had been in defendant's employ as a switchman but a few hours, was wholly inexperienced, and ignorant of the dangers incident thereto, all of which facts were known to defendant, states facts making it the duty of defendant to have warned plaintiff of the danger to be encountered by him.—*RECEIVERS OF INTERNATIONAL & G. N. R. V. MOORE*, Tex., 22 S. W. Rep. 272.

76. MASTER AND SERVANT—Fellow-servants—Vice-principal.—If an employee is injured by reason of the negligence of the foreman or superintendent in charge of the work, he can only recover against the employer when the foreman or superintendent was negligent in performing duties which the law imposes on the master personally, and cannot recover if the foreman or superintendent was merely negligent in the performance of such work as properly pertains to a servant; as, for instance, in pounding and prying upon a rock in a stone quarry.—*STOCKMEYER V. REED*, U. S. C. C. (Ind.), 55 Fed. Rep. 259.

77. MECHANIC'S LIEN.—Insolvent Debtor.—Where an insolvent debtor is entitled to a lien for labor or materials, his assignee in insolvency may prosecute and enforce the same.—*MILLER V. CONDIT*, Minn., 55 N. W. Rep. 47.

78. MORTGAGE—Foreclosure.—A court of equity, pending an appeal without *superseas*, from a final decree in a foreclosure suit, settling the priority of liens, and fixing a day for sale, has power to postpone the sale, if a sale on the day fixed would be oppressive or unjust.—*BOUND V. SOUTH CAROLINA RY. CO.*, U. S. C. C. (S. Car.), 55 Fed. Rep. 186.

79. MORTGAGE—Foreclosure Sale—Jurisdiction.—The jurisdiction of a court to set aside a foreclosure sale on motion in the original action is not affected by the fact that the purchaser, who is made a party to the motion, is a non-resident of the county in which such motion is filed.—*HANSBRO V. BLUM*, Tex., 22 S. W. Rep. 270.

80. MORTGAGE—Foreclosure—Service by Publication.—In foreclosure proceedings in the United States Circuit Court against the eight heirs of the mortgagor, six were without the district, and an order of warning was made against them, and after publication for 10 successive days in a daily paper a judgment of sale was obtained: Held, that since the Federal statute of March 3, 1875, requires orders of warning to be published not less than once a week for six successive weeks, no jurisdiction of the six children was obtained, and the sale did not divest their title to the land.—*MERCANTILE TRUST CO. V. SOUTH PARK RESIDENCE CO.*, Ky., 22 S. W. Rep. 314.

81. MORTGAGES—Judgments—Priority.—Where lots are purchased with the proceeds of the sale of a farm owned by a married woman, and occupied as a homestead, and the title to such lots is taken in the name of the husband, the latter holds such title in trust for his wife—the equitable owner; and the liens of mortgages given thereon by the husband and son, and their wives, who each occupied separate portions of such lots as homesteads, are superior to the liens of prior judgments against the husband and son, in the absence of any equities in favor of the judgment creditors.—*SEEBERGER V. CAMPBELL*, Iowa, 55 N. W. Rep. 20.

82. MUNICIPAL CORPORATIONS—Drains—Negligence.—Where a city collects water through various ditches, and empties it into a city ditch in excess of its capacity, so as to overflow private property, it is liable for the damage caused, even though it was not bound in the first instance to construct or maintain such ditch.—*CITY OF HOUSTON V. BRYAN*, Tex., 22 S. W. Rep. 431.

83. MUNICIPAL CORPORATION—Gas Companies.—Rev. St. Ohio, § 2478, provides that municipal councils shall have power to regulate, "from time to time," the prices to be charged for natural or artificial gas furnished to citizens or public buildings within the town or city; and section 2479 provides that where the council fixes a minimum price for a period not exceeding ten years, and the gas company accepts it in writing, the council have no power to fix a less price during the period of time agreed on. An ordinance passed pursuant to these sections fixed a schedule of monthly charges for fuel gas, and in its second section declared that these should be the minimum charges required by the council for five years, and the ordinance was accepted by the company. Thereafter it was provided that consumers might elect to have the gas furnished by meter instead of at the schedule rates, and the same ordinance declared that "the contract heretofore made as to the schedule of prices shall be in full force, except as herein altered, and for the unexpired time of the original contract": Held that, while the contract, which relates solely to the minimum price to be fixed by the council, expires in five years, the provisions of the original ordinance fixing a maximum price remain in force until repealed or otherwise superseded.—*MANHATTAN TRUST CO. v. DAYTON NATURAL GAS CO.*, U. S. C. C. (Ohio), 55 Fed. Rep. 181.

84. MUNICIPAL CORPORATIONS—Special Tax—Assessment.—Where an ordinance providing for the paving of a certain street describes the street as narrower than it really is, an assessment levying a special tax upon abutting property, at a certain sum per square yard for the full, actual width of the street, is erroneous as being in excess of the ordinance.—*JEFFERSON COUNTY v. CITY OF MT. VERNON, Ill.*, 33 N. E. Rep. 1091.

85. MUTUAL BENEFIT INSURANCE—Contracts—Ultra Vires.—A contract by which a mutual benefit society undertakes to pay the death losses of another insurance company is *ultra vires* and void.—*TWISS v. GUARANTY LIFE ASS'n OF IOWA*, Iowa, 55 N. W. Rep. 8.

86. NEGOTIABLE INSTRUMENT—Failure of Consideration.—In an action on a note given for fertilizers, defendant cannot, under a plea of failure of consideration show, that the contract was void for plaintiff's non-observance of Gen. St. § 596, providing that every bag of such fertilizer shall have a printed label, stating the name, location, and trade-mark of the manufacturer, the chemical contents, the date of the analysis, and that the privilege tax has been paid, but such omission must be specially pleaded.—*DURHAM FERTILIZER CO. v. PAGETT*, 8. Car., 17 S. E. Rep. 563.

87. NEGOTIABLE INSTRUMENT—New Note—Illegality.—A new note given to raise money with which to pay off a prior note, which had been given to obtain means whereby to prosecute an unlawful business, is not affected by the illegality of the first note.—*BUCHANAN v. DROVERS' NAT. BANK OF CHICAGO*, U. S. C. C. of App., 55 Fed. Rep. 223.

88. NEGOTIABLE INSTRUMENT—Note—Pleading.—Where a party assumes to set forth specifically the facts constituting a defense of want of consideration, and the facts so pleaded are insufficient to establish such defense, the pleading is not aided by a general averment of want of consideration or benefit.—*PARKER v. JEWETT*, Minn., 55 N. W. Rep. 56.

89. NEGOTIABLE INSTRUMENTS—Fraud—Burden of Proof.—Where a promissory note has its inception in fraud, the burden of proof is cast upon a subsequent indorsee to show that he is a *bona fide* holder for value.—*AMERICAN EXCHANGE NAT. BANK v. OREGON POTTERY CO.*, U. S. C. C. (Oreg.), 55 Fed. Rep. 255.

90. NUISANCE—Contributory Negligence.—In an action for damages arising from a nuisance caused by dumping dead cattle into the stream from which the plaintiff obtained his water, the plaintiff's failure to lessen the nuisance by removing and disposing of the dead cattle does not constitute contributory negligence, especially when the place where the cattle lie

is on the premises of the defendant.—*GULF, C. & S. F. Ry. Co. v. REED*, Tex., 22 S. W. Rep. 283.

91. PARTNERSHIP—Accounting.—Plaintiff bought a half interest in defendant's business. It was agreed that the partnership could be terminated by plaintiff at the end of a year, on 30 days' notice, defendant to repay him the purchase price. Each partner was to enter in the firm books all moneys received by him: Held, that plaintiff did not forfeit his rights, in the absence of fraud, because of an omission to charge himself with a small amount received in the business.—*KEMP v. SMITH*, Iowa, 55 N. W. Rep. 86.

92. PRACTICE—Service of Papers.—Service upon an attorney at his office, he being absent, can be made by leaving the paper in a conspicuous place in the office only when there is in the office no clerk of his, or person having charge thereof.—*MIES v. THOMPSON*, Minn., 55 N. W. Rep. 44.

93. PRINCIPAL AND SURETY.—By the terms of an indemnity bond signed by a surety, the measure and limit of his liability was the deficiency, if any, after a foreclosure and sale of the mortgaged premises under a second mortgage: Held, under the facts alleged, that such foreclosure sale was a condition precedent to a right of recovery against the surety, notwithstanding the fact of a subsequent sale under the first mortgage for a sum equal to the market value of the property.—*BEEBE v. CANNEX*, Minn., 55 N. W. Rep. 61.

94. PRINCIPAL AND SURETY—Building Contract—Change of Plan.—The sureties in a bond of indemnity against liens arising in the course of the construction of a building, under a contract between the owner and contractor, held released by a departure from the terms of the contract in respect to plan and materials.—*ERICKSON v. BRANDT*, Minn., 55 N. W. Rep. 62.

95. PROHIBITION—Jurisdiction.—On a contest of a will, where the county court refuses to admit the will to probate on the ground, only, that testator was a non-resident, the remedy of proponent is by appeal, rather than by *mandamus* to compel the court to dispose of the case on the merits.—*PRESTON v. FIDELITY TRUST & SAFETY VAULT CO.*, Ky., 22 S. W. Rep. 318.

96. PUBLIC LANDS—Bounty Warrant—Cancellation.—Act Cong. June 28, 1860, authorizes the interior department to cancel bounty warrants which have been lost or destroyed; and where the petition in an action alleges, and the answer does not deny, that a certain warrant was canceled after its location, and the answer alleges that it had been lost, it will be presumed that it was regularly canceled, even conceding that the department would have no power to cancel a warrant unless lost or destroyed; and it is immaterial that the answer also alleges that before the warrant was lost it had been assigned in blank, and that it was found by some one, and purchased in good faith by the person who located it, where such allegations are not proven.—*DURHAM v. HUSSEMAN*, Iowa, 55 N. W. Rep. 11.

97. PUBLIC LAND—Location.—A person who locates land for another acquires no interest in such land as compensation for his services, in absence of a special agreement to that effect.—*BRANCH v. JONES*, Tex., 22 S. W. Rep. 245.

98. PUBLIC LANDS—State Lands—Surveys.—In running surveys it is the duty of the surveyor to depart from the calls when necessary to prevent conflict with prior claims, and if he keeps reasonably within the scope of the particular entry being surveyed his survey is conclusive on all persons whose claims originate subsequent to that entry.—*WALKER v. PHILLIPS*, Tenn., 22 S. W. Rep. 838.

99. QUIETING TITLE—Possession.—A mortgagee has sufficient title to maintain suit to quiet title preparatory to a sale under the mortgage.—*LOVE v. BRYSON*, Ark., 22 S. W. Rep. 841.

100. QUIETING TITLE—When Suit Lies.—One who has purchased land at execution sale under a void judgment obtained by him collusively with the defendant for the purpose of defeating the rights of a prior at-

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taehing creditor, cannot, by joining with him defend-
ant's husband, subject to whose alleged marital
rights the sale was made, entitled himself to maintain
a bill to remove the cloud created by the sale under
such prior attachment.—*SOWLES V. RUGG*, U. S. C. C.
Vt., 55 Fed. Rep. 163.

101. RAILROAD COMPANIES—Bonds and Mortgages.—
Where a railroad company is sued by a few minority
stockholders, and a receiver is asked, which suit is op-
posed by a great majority of stockholders, it is per-
fectly proper for the mortgage bondholders, upon de-
fault in the payment of their bonds, to institute a fore-
closure suit, and have a receiver appointed, and thus
to control any litigation which might withdraw from
the corporation the mortgaged property; and it is not
fraudulent or collusive for the officers of the corpora-
tion to admit the truth of the allegations of the bond-
holders' bill.—*PENNSYLVANIA CO., ETC. V. JACKSON-
VILLE, T. & K. W. RY. CO.*, U. S. C. C. of App., 55 Fed.
Rep. 131.

102. RAILROAD COMPANIES—Contributory Negligence.
—A brakeman on top of a moving train, with his face
towards the rear, intent on the discharge of his duty
at a place where there is danger that the train may
break in two, is not, as a matter of law, chargeable
with contributory negligence because he fails to take
notice that the train is approaching a low bridge.—
WALLACE V. CENTRAL VERMONT R. CO., N. Y., 33 N. E.
Rep. 1069.

103. RAILROAD COMPANIES—Failure to Fence.—In an
action against a railroad company for injuries to
plaintiff's crops by stock entering on his premises
through openings left by defendant in the construction
of its road, a plea of contributory negligence, which
alleges that plaintiff could have avoided all damages
by building a few yards of fence near defendant's pas-
senger depot, is good on general demurrer.—*GULF, C.
& S. F. RY. CO. V. SIMONTON*, Tex., 22 S. W. Rep. 285.

104. RECORDS—Sealed Instruments.—Where an in-
strument which the law requires to be sealed is in all
respects correctly recorded except that the record does
not show a copy of the seal, or any device represent-
ing it, the record will nevertheless be valid and suf-
ficient as notice, provided the record represents on its
face, in any other way, as by recitals or otherwise,
that the instrument was sealed, and it was in fact duly
sealed.—*BEARDSLEY V. DAY*, Minn., 53 N. W. Rep. 46.

105. RELIGIOUS SOCIETIES—Property Rights.—Where
the conditions under which a religious society is
formed and its property acquired require adherence to
a particular creed or system of doctrine and church
polity, a minority of the membership may insist upon
carrying out the purposes for which the society was
organized, and a majority will not be permitted to
divert the common property to other uses, or to use it
for the support and maintenance of doctrines, or a
polity essentially at variance with his original con-
stitution. The trust must be administered substan-
tially in accordance with the intention of the original
founders.—*SCHNADT V. DORNFIELD*, Minn., 55 N. W.
Rep. 49.

106. REMOVAL OF CAUSES—Sufficiency of Petition.—In
an action against known and unknown defendants to
determine adverse claims, if the known defendants be
served with process, they cannot be required to delay
an application for removal of the suit until persons
unknown, who might claim some interest in the mat-
ter in controversy, shall be served, and join in the ap-
plication.—*WALKER V. RICHARDS*, U. S. C. C. (Minn.),
55 Fed. Rep. 129.

107. RES ADJUDICATA—Final Decree.—In partition
the issue was whether complainants were entitled to
the shares of their deceased brothers and sisters, under
the will of complainants' grandfather, or whether such
shares belonged to their father: Held, that a decree
that complainants were entitled to such shares was
binding on the father, who was a party to the suit,
since it settled the question that he had no interest in
the property, though it did not finally adjudicate the

rights of the children as between themselves; and
that, in the absence of fraud, such decree could not be
assailed by the creditors of the father, and the land
subjected to their claims.—*GARDNER V. STATTON'S
ADM'R.*, Va., 17 S. E. Rep. 353.

108. SPECIFIC PERFORMANCE—False Representations.
—A land company agreed to donate land money and
erect a building for a manufacturing company, in con-
sideration that the latter would move its plant there
and operate it on a specified scale. In a suit by the
manufacturing company for specific performance, the
defense was the contract was induced by plaintiff's
false representations and fraudulent concealment of
material facts. A soliciting agent of the land com-
pany had visited plaintiff's factory pending negotia-
tions for the contract, and had seen its machinery, but
he was not a scientific or practical machinist, and he
was not furnished with any means of investigation of
plaintiff's financial condition: Held, that it could not
be said that in executing the contract the land com-
pany relied on its own knowledge and judgment, as
derived from the investigations of its agent.—*LIECH-
STER PIANO CO. V. FROST ROYAL & RIVINGTON IMP. CO.*,
U. S. C. C. OF APP., 55 Fed. Rep. 150.

109. SPECIFIC PERFORMANCE—Mutuality.—A unilateral
contract for the sale of land, reciting a nominal con-
sideration of one dollar, but in fact entered into with-
out any consideration, binding the vendor to convey
the land within 10 months from date, at the vendee's
option, but expressly exempting the vendee from all
obligation to purchase, will not be specifically enforced
in equity, since there is no consideration and no mutu-
ality.—*GRAYBILL V. BRAUGH*, Va., 17 S. E. Rep. 558.

110. TAXATION—Interstate Commerce—Sleeping Cars.
—A foreign corporation owning sleeping cars which
are engaged in interstate traffic, and only came into
the State for the purpose of receiving and discharging
passengers, and for the purpose of having such minor
repairs made as they casually require, is not wholly
exempt from taxation under the laws of the State, but
may be assessed "in the ratio which the number of
miles of the line within the State has to the total num-
ber of miles of the entire line," pursuant to Acts La.
1890, No. 106, § 29.—*PULLMAN'S PALACE-CAR CO. V.
BOARD OF ASSESSORS*, La., 55 Fed. Rep. 207.

111. TAXATION—License—Slaughterhouse.—The
"business of slaughterhouse," as used in the license
law of 1890, means the business of slaughtering animals
for sale. It does not matter whether it is carried on in
a house or in a shed, on his own property or on rented
property, whether he slaughters his own animals or
those of others; if the slaughtering is followed as a
business, and is for public sale of the animals slaugh-
tered, it is subject to the license.—*THIBAUT V. HERRBERT*,
La., 12 South. Rep. 331.

112. TELEGRAPH COMPANIES—Measure of Damages.
—Defendant telegraph company received for transmis-
sion to plaintiff the following message: "How many
beeves and bulls have you? Don't go away; will get
them off. Answer:" Held, that the message advised
defendant that it related to a matter of business in
which loss would probably result if it was not promptly
delivered, and defendant was liable for nominal dam-
ages, and for such further damages as naturally resulted
from the failure to deliver the message.—*WESTERN
UNION TEL. CO. V. WILLIFORD*, Tex., 22 S. W. Rep.
244.

113. TOWNS—Incorporation for School Purposes.—
Act April 10, 1891, allowing towns and villages to incor-
porate for school purposes, provided the territory in-
cluded in the incorporated limits shall not exceed
four square miles, permits incorporation, although
the town does not lie in the center of the proposed
district, and although the order of election states the
purpose as being to incorporate the town and adjacent
territory.—*STATE V. ALLEGREE*, Tex., 22 S. W. Rep. 289.

114. TRIAL—Directing Verdict.—The trial court can-
not, where there is any evidence tending to support
an issue, direct the jury as to their verdict.—*JOHNSTON
V. DROUGHT*, Tex., 22 S. W. Rep. 250.

115. **TRUSTS.**—Where a trustee holds land under an express trust for a married woman, no trust results in his favor from the fact that he subsequently advanced her money with which to pay off a vendor's lien on the land.—**NORRIS v. WOODS**, Va., 17 S. E. Rep. 552.

116. **VENDOR AND VENDEE—Contract—Offer.**—The acceptance of an offer to sell land must be in writing.—**FOSTER v. NEW YORK & T. LAND CO.**, Tex., 22 S. W. Rep. 260.

117. **WILL—Conversion.**—A will devising the residue of testator's property to trustees, with directions to convert it into money, and to divide it among designated legatees, works a conversion of the realty into personalty, and in construing the will the rules governing personal property are to be applied.—**BOWDITCH v. AYRAULT**, N. Y., 33 N. E. Rep. 1067.

118. **WILLS—Equitable Estates.**—A devise of real estate to trustees, in trust to collect the rents, and pay a definite sum annually to the widow of the testator during her life, and to divide the residue equally among his children, "or their heirs," and at the death of his widow to convey an equal part of his lands to each of his children, "or their heirs," vests an equitable estate in each of his children at the death of the testator, in the absence of a clear intention to postpone the vesting to some later time.—**BOLTON'S TRUSTEES v. BANKS**, Ohio, 33 N. E. Rep. 1115.

119. **WILL—Power of Sale.**—Where a discretionary power of sale is given an executor, he may delegate the execution and delivery of the deed to another; the negotiation of the sale, and the arrangement of, and agreement, to, all its details, being done by himself.—**SMITH v. SWAN**, Tex., 22 S. W. Rep. 247.

120. **WILL—Testamentary Powers—Sale of Stock.**—A will giving testator's wife "the interest that may accrue" on designated bank stock "after my death, as long as she lives, to do as she may please with," and which appoints the wife executrix, and provides that, "if necessary to change the bank stock, or any or either, from any cause now unforeseen that may arise, she is authorized to do so," vests the wife with discretionary power to sell the stock; and such discretion is not abused by a sale of stock on which the bank had failed to pay dividends for several years.—**TRIMBLE'S EX'X v. LEBUS**, Ky., 22 S. W. Rep. 329.

ABSTRACTS OF DECISIONS OF MISSOURI COURTS OF APPEAL.

KANSAS CITY COURT OF APPEALS.

AGENCY—Revocation of Authority.—Where the owner of a house and lot authorizes a broker to sell the same at a certain price, the subsequent destruction of the house, before the agent effects a sale, operates to determine his authority, and he is not entitled to a commission on the sale of the vacant lot, at a smaller price, by the owner to a person to whom the broker had endeavored to sell the house and lot.—**COX v. BOWLING**.

ATTACHMENT—Chattel Mortgage—Title.—When the surety in forthcoming bond given in attachment suit to retain possession of property already subject to a duly recorded chattel mortgage, subsequently purchases the property at a sale under the mortgage, he acquires a title superior to and exclusive of the attachment and judgment sustaining it.—**KELLEY v. SITLING-TON**.

ATTACHMENT—Prior and Subsequent—Fraud.—A bona fide creditor's bona fide attachment, for existing good cause, is not destroyed, nor are his rights postponed, to subsequent attaching creditors, because he pays the debtor defendant a money consideration to permit a judgment sustaining the attachment and for the debt, nor because he releases part of the property attached. By obtaining the judgment he only obtains his rights. The fact that he pays the defendant to permit the

judgment to be rendered without a contest, ought not to work to his detriment, since he would have obtained the same result at the end of a contest.—**DOGGETT, BASSETT & HILLS v. WIMER**.

ATTACHMENT—Injunction—Situs of Debt.—The interposition of a court of equity of any State may be invoked by a citizen to restrain another citizen thereof, from prosecuting an attachment suit in a foreign State for the purpose of evading their domiciliary laws, without violating any rule of comity existing between the States. Contracts respecting personal property and debts are treated as having no situs. They are subject to the law of the domicile of the owner. Yet, this fiction yields to the law respecting the attachment of property of non-residents, such laws assuming that the property has a situs distinct from the owner's domicile. Wherever the creditor may maintain a suit to recover the debt, there it may be attached as his property, provided the laws of that place authorize it. This opinion being in conflict with the opinions of the St. Louis Court of Appeals in *Keating v. Refrigerator Co.*, 32 Mo. App. 293; *Bank v. Wickham*, 23 Mo. App. 663; *Fild v. Jessup*, 24 Mo. App. 91, this cause is certified to the supreme court.—**WYETH HARDWARE & MANUF'G CO. v. H. F. LANG & CO.**

CHattel Mortgage—Execution—Replevin.—An attempt by a constable to sell or dispose of mortgaged chattels under an execution on a judgment against the mortgagor, is such a violation of that condition of the mortgage which provides that, "in case of a sale or disposal, or attempt to sell or dispose of said property," "the mortgagee, his assigns or legal representatives, may take the said property, or any part thereof, into his possession," as authorizes the mortgagee to take possession of the property.—**BROWN v. HAWKINS**.

DEED OF TRUST—Marginal Release—Payment.—The release of a deed of trust entered on the margin of the record, by the assignee of the note, read as follows: "The debt mentioned in the within deed of trust having been fully paid and discharged, I hereby acknowledge satisfaction in full and release the property therein conveyed from lien and incumbrance thereon." Held, in an action on the note, that this recital is, as to subsequent purchasers of the land, conclusive evidence of the fact of the release of the land from the lien of the deed of trust, but not conclusive evidence of the payment of the debt. It is a receipt, only, open to explanation like any other receipt.—**SOUTH MISSOURI LAND CO. v. RHODES**.

DEMURRER—Pleading—Amendments.—Under our Code of Civil Procedure, Sec. 2041, Rev. Stat. 1889, a demurrer is a pleading, and is therefore, a part of the record proper. Under the provisions of Secs. 2066, 2067, and 2068, Rev. Stat. 1889, in order to deny the plaintiff the right to file an amended petition, the court must have adjudged three petitions insufficient. Those statutes do not apply to voluntary amendments.—**BARTON v. MARTIN**.

ESCROW—AGENCY—DELIVERY.—An agent of one party may become the depository of an escrow whenever he is such an agent as that his acting as custodian of a paper put into his hands, not as a delivery, but as an escrow, is not antagonistic to his principal's interests. An application for insurance may be delivered in escrow to an agent of the company, who is only an agent to solicit and take applications, and the delivery of the application, in violation of the trust reposed in the depository is void.—**PRICE v. THE HOME INS. CO.**

GIFT—Inter Vivos.—To constitute a gift *inter vivos* there must be an absolute and unequivocal intention on the part of the donor to pass the title and possession of personal property, at once, to the donee; there must be a parting with the title to the thing given, in *presenti*, absolutely and irrevocably, and such a delivery of possession as works an immediate change of dominion over the property.—**TYGARD, GUARDIAN, ETC. v. McCOMB, ADM'R.**